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## LIABILITY OF TELEGRAPH COMPANIES.

When Mr. Hitchcock addressed the American Bar Association in 1879, his listeners no doubt were surprised to hear that there were at that time, in the United States, almost 100,000 miles of telegraph lines, over which, in a single year, very nearly 28,000,000 messages had been sent.<sup>1</sup> Since that time, the telegraph industry, despite the fierce competition of the telephone which Graham had just invented, has developed so rapidly that the president of the Western Union Telegraph Company could report to the stockholders of that corporation, last October, that their company alone controlled over 1,000,000 miles of line, and that in the preceding twelve months almost 70,000,000 messages had run over those wires, in addition to the unaccounted number sent over private wires, leased by brokers, press associations, etc.<sup>2</sup>

From the beginning, the importance of the industry was recognized, and ever since the first telegraph case came before our courts, over half a century ago,<sup>3</sup> every question

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<sup>1</sup> American Bar Ass'n Reports, 93, at 105.

<sup>2</sup> President's Report, October 14, 1903, p. 7.

<sup>3</sup> *Shields v. Wash. Tel. Co.*, 9 West. Law J. 283, 1852.

relating to this since frequent visitor to our forums has been treated by our judges with the greatest earnestness and deliberation.

And this was but natural. No Holt or Mansfield or Kenyon had applied his great mind to the problem of training this stranger to the common law, and to the judges of our generation came the responsibility of devising the proper means of treatment. Thus obliged to act without guide, it is but natural that unanimity of opinion should not have resulted. But it is strange that the more consistently they have been careful, the less careful they have been to be consistent, and upon scarcely a point in the law of telegraphs, be it of great or of little importance, is there not a diametrical opposition of decision. Not only has the disagreement been as to the possibility of reaching certain desired results by legal rules, but as to the desirability of reaching those results even if that were possible by legal rules.

The specific gravity of law is necessarily less than the specific gravity of public policy, and in these telegraph cases has this truth been made especially clear. Public opinion, too, as the geographical grouping of the jurisdictions shows, has played no small part in the determination of the questions which we shall have to consider. Narrow indeed would be that lawyer who would deny that these factors should be given due weight. When all is over, it will be found that they are controlling; that "law can ask no better justification than the deepest instincts of man,"<sup>4</sup> and that as man has a heart, so there must be a "heart of jurisprudence."<sup>5</sup> The problem which we must attack, therefore, is not simply "How stands it written?" but "What does the sense of right of an average man dictate?"

### I. THE DUTY.

When a man goes to a telegraph office, and pays the operator to send a lawful message, which the latter agrees to send, it would seem unquestionable that the telegraph company, which the operator represents, comes into a con-

<sup>4</sup> Holmes, *The Path of the Law*, 10 Harv. L. Rev., 457, at 477.

<sup>5</sup> Theodore Sedgwick, in 10 Law Reporter, 49, at 56, 1847.

tractual relation, and therefore under a contractual liability, to the man. There is an agreement between parties capable of contracting, by which one agrees to do a lawful act, on a valuable consideration paid by the other. The agreement is to make reasonable efforts to transmit the message with speed and accuracy, and to deliver it with speed and accuracy. That a telegraph company is always under a contractual liability to the sender of the message seems clear. We shall have to consider later whether this be the only liability of the company to the sender, and if there be another, we shall have to decide upon which the sender can hold the company more beneficially, if it be guilty of a breach of its duty.

Is the telegraph company under a contractual liability to the person to whom the message is to be sent? The company does not agree with the addressee himself that it will send the message with all reasonable rapidity and correctness, and it could come into a contractual relation with him, therefore, only through the sender, *i. e.*, if the sender really were contracting for the addressee. This would be the case if the sender were the addressee's agent, or if the sender entered into the contract with the company for the benefit of the addressee.

From the nature of the contract itself, this relation of principal and agent seldom would exist between the addressee and the sender of a message. In the case of commercial messages, the relation is very much more frequently the antagonistic one of vendee and vendor than the co-operative one of principal and agent. In the case of non-commercial messages, the agency rarely would exist in advance, from the nature of things, and the relation could be created by ratification only if the sender had purported to act for the addressee.

A person not really a principal cannot become entitled to the rights and liable to the duties of one by ratification, if he were undisclosed at the time that the contract was made.<sup>6</sup> The nature of the telegram might be held to show that the message was sent for the benefit of the addressee, but it scarcely would be held to show that the relation of

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<sup>6</sup> *Maxsted & Co. v. Durant*, App. Cas. 1901, 240.



principal and agent existed between the sender and the addressee. In such case, then, the addressee could sue as principal only if the sender had said that he was acting as the addressee's agent.

So that, although the existence of an actual agency, or, what is equivalent, a ratification, when possible, would place the telegraph company under a contractual liability to the addressee,<sup>7</sup> it seems that, as a practical matter, this liability would seldom exist.

The right of one for whose benefit a contract has been made, to sue upon it, is very closely analogous to the right of a principal, and it is possible that had the English and Massachusetts courts more considered the close resemblance, bearing in mind how the theory of ratification has extended the cases in which the relation of agency is held to exist, those courts might have allowed the so-called "beneficiary" of a contract to sue upon it. On the generally accepted doctrine of the American state courts that the beneficiary of a contract may sue upon it, in what cases could the addressee of a telegram sue the telegraph company? In answering this, we must consider first the limitations on the beneficiary's right.

In the first place, the beneficiary's right to sue in any case is denied in some jurisdictions.

In the second place, although we are accustomed to hear it said that the rule in *Lawrence v. Fox*<sup>8</sup> enables any one for whose benefit a contract is made, to sue upon it, yet the rule is applied much less broadly, and is accurately expressed, "When one for a valuable consideration agrees with another *to pay the debts of that other person to a third person*, such agreement inures to the benefit of the third party, who may maintain an action thereon."<sup>9</sup>

What debt can the sender of a message owe to the addressee, which will be paid by sending the message? Al-

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<sup>7</sup> *Milliken v. W. U. T. Co.*, 110 N. Y. 403, 1888; *Manker v. W. U. T. Co.*, 34 S. 839, Ala. 1902; where the addressee was in fact the sender's principal, though undisclosed at time message sent: *W. U. T. Co. v. Millsapp*, 33 S. 160, Ala. 1902.

<sup>8</sup> 20 N. Y. 268, 1859.

<sup>9</sup> Per Brown, A. J., in *Mathonican v. Scott*, 87 Tex. 396, at 398, 1894. (Italics ours.)

though a considerable number of courts has placed the addressee's right to sue, upon the rule of *Lawrence v. Fox*,<sup>10</sup> it seems clear that if that rule be applied with the limitations placed upon it by subsequent decisions, it furnishes in few, if any, cases an adequate explanation of the addressee's right of action.<sup>11</sup>

Despite the warning of those who most strongly advocate codification, it has been regarded by many courts as a "panacea for all the ills which afflict judicial and forensic life,"<sup>12</sup> and an attempt has been made to extend the doctrine of beneficiary, in virtue of the provision, in all of the codes which follow the New York Code, allowing the party in actual interest to sue. Since most of the conflict has been as to who was the person actually interested in the contract, to hold that the code entitles the third party to sue is to cut the Gordian knot in a way definitive rather more than justifiable. It would seem, too, almost conclusive against giving such weight to the code provision that it was not even mentioned in *Lawrence v. Fox*, which was decided subsequently to the adoption of the code.

In this dilemma, the Texas courts have taken a far step in advance, and one which might be upheld more easily had it been made more consciously. For the purposes of telegraph litigation, the rule of *Mathonican v. Scott* (*supra*) is disregarded entirely—indeed, we have not found a single telegraph case in which that rule is mentioned—and the doctrine acted upon, that "the party to be in fact accommodated, benefited or served, holds the beneficial interest in the contract. We think the question as to who may maintain a suit for damages for the breach of contract depends upon who in fact was to be served, and who is damaged."<sup>13</sup> We shall consider later the results of this vague test, but one cannot but feel at once that to treat as the real party to a contract whoever may, as matters eventu-

<sup>10</sup> *Aiken v. W. U. T. Co.*, 5 S. C. 358, 1874; *Russell v. W. U. T. Co.*, 57 Kans. 230, 1896; *Barrack v. P. T. C. Co.*, 12 Ohio Dec. 78, 1899.

<sup>11</sup> 15 Harv. L. R. 143, 1901.

<sup>12</sup> Address of D. D. Field (one of the framers of the N. Y. Code) before the Law Academy of Philadelphia, in 1886.

<sup>13</sup> Per Henry, A. J., in *W. U. T. Co. v. Adams*, 75 Tex. 531, at 536, 1889.

ate, be injured by its breach, is not only to apply the doctrine of ratification to a relation not that of principal and agent, but to reach a conclusion far beyond any reached by an application of that doctrine elsewhere. And even on the Texas rule, broad as it is, there would be many cases where the addressee could not recover; for some messages certainly are sent purely for the sender's benefit, and in such case the addressee should not be allowed to sue.

If there be no agency, and if the addressee be not the beneficiary, there can be no contractual relation between the addressee and the company; the practical result of which would be that the addressee rarely could sue as a party to the contract.

Few courts outside of Texas, therefore, have rested the addressee's right of recovery upon any contractual basis. In England, the Court of Appeal was unable to find any other ground of liability, and accordingly denied the addressee's right of recovery in a case where no contractual relation could be established.<sup>14</sup>

Since the internal telegraph lines in England are under the control of the postmaster-general,<sup>15</sup> for the negligence of whose subordinates, as in case of other public officers, there can be no recovery,<sup>16</sup> the questions which arise so often in this country rarely require decision in England—indeed, we have been unable to find a case in which the addressee has sued for negligent transmission or delivery since 1877. It has been suggested, however, that should the case reach the House of Lords, a different result might be reached by that body now, than was arrived at by the Court of Appeal twenty-five years ago.<sup>17</sup>

In the United States, the courts with practical unanimity have sustained the addressee's right of action, but this unanimity has been limited strictly to the conclusion reached; the different theories on which the results have

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<sup>14</sup> *Dickson v. Reuter's Tel. Co.*, L. R. 3 C. P. D. 1, 1877, following *Playford v. U. K. E. T. Co.*, L. R. 4 Q. B. 706, 1869.

<sup>15</sup> 31 and 32 Vict. C. 110, 1868; 32 and 33 Vict. C. 73, 1869, the "Telegraph Acts."

<sup>16</sup> *Casualty Co. v. Ry. Co.*, 117 Fed. 434, 1902; Mayne, Damages (6th ed.), 328.

<sup>17</sup> Pollock, Torts (3d ed.), p. 496.

been obtained have been almost as numerous as the courts which have obtained them. It is proposed to examine some of these theories.

1. *Misrepresentation*.—The eminent counsel (Herschell, Benjamin, Q. C. C. and Butler) in *Dickson v. Telegraph Co.*, *supra*, who were suing for the careless delivery to them of a message intended for another, upon which message the plaintiff acted to his injury, based their claim mainly upon *Collen v. Wright*.<sup>18</sup> This case had established that a person who, through an honest mistake, believed himself authorized to contract as agent for another became individually liable on the contract so made, upon the theory that he impliedly warranted his authority to act as agent. The telegraph company, was the argument, in the same way warrants that it was authorized to deliver this message to the plaintiff; it was not authorized to deliver it to the plaintiff at all, and is liable for this breach of its warranty of authority. The court answered, *Collen v. Wright* applies only to cases where a contract is made with the person who supposes himself to be an authorized agent.<sup>19</sup> Here, the claim is really that the company misrepresented a fact, viz., the person to whom the message was addressed, and *Collen v. Wright* is no exception to the general rule that “no erroneous statement is actionable unless it be intentionally false”; there was carelessness, it is true, but “it is never laid down that the exemption from liability for an innocent misrepresentation is taken away by carelessness.”<sup>20</sup>

It seems to us that the court was clearly right as to the inapplicability of *Collen v. Wright*,<sup>21</sup> but it seems to us more doubtful whether their conclusion on the question of misrepresentation was correct.

<sup>18</sup> 8 E. & B. 647, 1857.

<sup>19</sup> The dealing with the supposed agent need not be intended to eventuate in a contract: *Starkey v. Bank of England*, App. Cas. 1903, 114.

<sup>20</sup> Per Bramwell, L. J., at 6.

<sup>21</sup> It scarcely would be claimed that the telegraph company would be liable in the absence of negligence, whereas liability for breach of implied warranty of authority exists even though there be no negligence: *Oliver v. Bank of England*, 1 Ch. 1901, 652. The doctrine of *Collen v. Wright* was applied without any mention of that case, however, in *May v. W. U. T. Co.*, 112 Mass. 90, 1873, which case is, as far as we have been able to find, unique in this respect.

*Peek v. Derry*<sup>22</sup> had not been decided then, but if, as Lord Bowen said, "there is not a lawyer living who has ever heard the law laid down in an action for deceit (*i. e.*, for damages for fraudulent misrepresentations) except in one way, and that is the way in which *Peek v. Derry* has decided,"<sup>23</sup> we fairly may test *Dickson v. Tel. Co.* on the rule of *Peek v. Derry* to determine whether the company could be held in deceit.

It must be premised that the company could not be held liable on this view, in case of the non-delivery of the message, for in such case it would have made no representation at all to the addressee, except under certain improbable circumstances. So even if we find that the sendee could sue for inaccurate delivery, and possibly for late delivery, we should not have laid ground for the addressee's recovery, in case of non-delivery.<sup>24</sup>

*Peek v. Derry* requires that the statement must be made with at least an honest belief in its truth. In a case like *Dickson v. Tel. Co.*, A. has given the company a message to send to X.; the company represents that the message was to be sent to Y. The company is not making a careless statement of opinion; it is misrepresenting a fact which it knows. Not only had it—*i. e.*, the agent who made the mistake originally—no grounds for supposing that the message was intended for Y., but it had express notice that it was intended for X. Surely the company would not be allowed to escape liability for its misstatement by saying that it honestly believed that A. meant the message to be sent to Y., although he distinctly said that he wanted it sent to X. Even under *Peek v. Derry*, and *a fortiori* in this country, where a careless misrepresentation is not allowed to go unpunished, we believe that a telegraph company can be held liable in deceit for carelessness in the transmission of a message.<sup>25</sup>

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<sup>22</sup> 14 App. Cas. 337, 1889.

<sup>23</sup> *Angus v. Clifford*, 2 Ch. D. 1891, 449, at 470.

<sup>24</sup> We use sendee to mean one to whom message is delivered by the company, whether late or inaccurately; and addressee to mean one to whom message is not delivered by the company at all.

<sup>25</sup> Dictum in *Russell v. W. U. T. Co.*, 57 Kans. 230, 1896.

But, as we have seen, this would leave the addressee unprotected, and it would be difficult to allow recovery by the sendee where the message was delivered correctly, but late.

2. *Malfeasance as Agent*.—The most important early case in this country in which the sendee sued was the Dryburg case.<sup>26</sup> There the message had been inaccurately delivered, and the sendee, acting on the inaccurate message, had suffered a loss. The plaintiff claimed that the telegraph company was the sender's agent, and that, like any other agent, it was liable to any one injured by its misfeasance. The lower court (per Sharswood, P. J.,) rejected this contention, but the Supreme Court reversed its decision, saying (per Woodward, J.,) "I am inclined to think the company ought to be regarded as the common agent of the parties at either end of the wire. But, however this may be, regarding the company as alone the agent of the sender of the message, is it to be doubted that the agent is liable for misfeasance, even to third parties? For non-feasance, I agree, the agent is responsible only to his employer, because there is no privity of consideration, betwixt the agent and a third party."<sup>27a</sup>

Of this view, as of the previous one, it must be premised that it would allow recovery only in cases where there was an inaccurate delivery. It certainly would not permit the addressee to recover,<sup>27</sup> and it seems very doubtful whether a late delivery could be termed a misfeasance. But there is another objection—the telegraph company is not an agent; it is an independent contractor, if ever there was one. Of agency, it is said "that the agent shall, for the time being, put his own will under the direction of another, is one of the primary elements in the relation."<sup>28</sup> Does the telegraph company put its will under the sender's direction? Can he in any way control the *mode* of performance of the contract, or is his right limited to the *fact* of performance? When we consider the definition of an inde-

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<sup>26</sup> *N. Y. & Wash. Prtg. Tel. Co. v. Dryburg*, 35 Pa. 298, 1860.

<sup>27a</sup> At 303.

<sup>27</sup> Wharton, Contracts, 791.

<sup>28</sup> Mechem, Agency, § 473.

pendent employment, it appears reasonably clear that a telegraph company is, in the delivery of a message, an independent contractor;<sup>29</sup> for he represents "the will of his employer only as to the result of his work, and not as to the means by which it is accomplished."<sup>30</sup>

However, even admitting that the company is an agent, our problem is defined merely, and in no way solved. An agent is liable to one injured by his malfeasance only in certain cases, viz., where he owes the person injured a duty of care, and this brings us in another way to a third view of the nature of the telegraph company's liability to the addressee of a message; that it is based on negligence.<sup>31</sup>

3. *Negligence*.—There are probably few more inclusive terms in our law than negligence, and accurately to define the word in concrete terms seems to us almost impossible. It is the breach of a duty of care; but this does not help us. In what circumstances does this duty of care exist? We can arrive at a more satisfactory answer to this question, perhaps, by considering what legal duties a man has, or, which is a correlative statement, what legal rights a man has.

We may divide a man's rights roughly into two classes: (1) His rights that other men shall not do or omit to do certain acts in any event, and (2) his rights that other men shall not do or omit to do certain acts, if their performance or omission is likely to injure him. This first class of rights we call absolute, and the second class we call relative. Of these absolute rights the most important is that of having those who contract with us fulfill their contracts.

<sup>29</sup> Bigelow, L. C., on Torts, 625, 1875; Joyce, *Electric Law*, § 907, 1900; *Pepper v. W. U. T. Co.*, 87 Tenn. 554, 1889; *Shingleur v. W. U. T. Co.*, 72 Miss. 1030, 1895; *P. T. C. Co. v. Shaefer*, 23 Ky. Law. Rep. 344, 1901. It was held that the company is the sender's agent: *Germain Fruit Co. v. W. U. T. Co.*, 70 Pac. 658, Cal. 1902 (dictum).

<sup>30</sup> Mechem, *Agency*, § 777.

<sup>31</sup> Bigelow, L. C., on Torts, 626, 1875; *Ferrero v. W. U. T. Co.*, 9 App. D. C. 455, 1896. Wharton seems to hold the same opinion, for he bases the liability of the company on the duty, "*Sic utere tuo ut non alienum lædas* (Negligence, § 764)"; which is one form of expressing the law of negligence. It is suggested that if the English courts had treated the question of liability in deceit as a question of negligence, *Peek v. Derry* would not have been decided as it was.

It is well settled that breach of contract is actionable whether it result in pecuniary loss or not.<sup>32</sup>

Of the relative rights there are two kinds, those in which damage is presumed, such as trespass, and those in which damage must be proved. For practical purposes, these relative rights in which damage is presumed are no different from absolute rights<sup>33</sup> and the two are often confused, but the distinction between them is brought out clearly in Pigott's admirable discussion:<sup>34</sup> "In all cases of trespass, damage is presumed. . . . It is not difficult to account for this, because it is impossible to say even from the mere act of walking on a man's land that no damage can possibly have accrued; and if it does not take the form of damage by injury to the grass, it may take the form of

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<sup>32</sup> Broom, Common Law (9th ed.), 72. It would be most interesting to discover the origin and trace the development of this doctrine by which a man who has suffered no pecuniary loss, and has no future rights to protect,<sup>a</sup> should be allowed to recover nominal damages in apparent forgetfulness of the court's repugnance to litigation. One would think at first that here was a most appropriate place for the application of the maximum *de minimis non curat lex*; and yet, although the failure to award nominal damages is not reversible error when such recovery does not carry costs, we have found but a single case in which the court denied the right of a person who had suffered no pecuniary loss from the breach of a contract to recover nominal damages.<sup>b</sup> The damages, we scarcely can suppose, are punitive. Mr. Markby has suggested that it is inconsistent to hold the breach of a contract to be the infringement of an absolute right, and defamation to be the breach of a relative right,<sup>c</sup> and it may be that breach of contract is the breach of a relative right, damage being presumed as in the case of many other relative rights, such as trespass. On this view Mayne's classification of breach of contract and of trespass together<sup>d</sup> would be correct, but they should then both be classed, not as absolute, but as relative rights. The conclusion is rather startling—that on our definition of absolute rights, this time-honored term is nothing but a name.

<sup>33</sup> Jenks, Law Quarterly, January, 1903, p. 20.

<sup>34</sup> Law of Torts, 125 to 144.

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<sup>a</sup> Of course, where the contract requires continuous acts, nominal damages will be awarded to vindicate the right to performance of the future acts. In such case, an injunction even will be granted: *Dickinson v. Canal Co.*, 15 Beav. 260, 1852; just as trespass, not injurious in itself, will be restrained to prevent the acquisition of an easement: *Walker v. Emerson*, 89 Cal. 456, 1891. But this is obviously a different case from those where the contract is for but one act, and as to which the plaintiff has no future interest.

<sup>b</sup> *Weber v. Mining Co.*, 16 Cape L. J. 128, 1898, South African Republic. This case may have been influenced by the eccentricities of the local law.

<sup>c</sup> Elements of Law, 699, note 1.

<sup>d</sup> Damages (6th ed.), 6.



depriving him of the charge for coming on the ground, which he was otherwise entitled to make.”<sup>35</sup> But in some cases damage must be really proved, *i.e.*, the act or omission complained of must be shown to have caused damage to a legal right.

This is true in all actions on the case; and negligence is an action in the case. The conclusion would be that carelessness becomes a legal wrong, *i. e.*, negligence, only when it causes what the law regards as damage.<sup>36a</sup>

Now, when a telegraph company delivers a message carelessly, what actual damage does it cause? Evidently if the message be commercial, it causes pecuniary loss, and the law always has said that a man is under a duty to avoid the infliction on another of pecuniary loss, through the former's carelessness, if such loss reasonably should have been foreseen as likely to follow the carelessness. But suppose that the message be social, and that the only consequence of its careless delivery reasonably to be foreseen is a sentimental injury. Is a man bound so to act as not to cause sentimental injury to another? Or, in other words, has a man a legal right to “mental tranquillity”?<sup>36</sup> There is, of course, but one way of discovering what legal rights a man has, and that is by seeing what interests the law has protected. We do not believe that the law has protected a man's interest in the peaceful state of his mind, and we do not think, therefore, that a telegraph company is bound, on any principle of negligence, so to act as to avoid causing sentimental dis-ease. We shall consider later the very important distinction between the questions whether the infliction of mental anguish constitutes a legal injury, and whether when there is a legal injury and it causes mental anguish, the mental anguish is an element of damage.<sup>37</sup>

<sup>35</sup> At 143.

<sup>36a</sup> Of course, the *tendency* of the act to cause the legal injury must exist also, so that a reasonable man would foresee the probability of legal injury, but with this question of fact we are not concerned here.

<sup>36</sup> Hale, Damages, § 39.

<sup>37</sup> “There is a material distinction between damages and injury. . . . The word ‘injury’ denotes the illegal act, the term ‘damages’ means the sum recoverable as amends for the wrong.” *Vernon v. Voegler*, 103 Ind. 314, 318, 319, 1885.

We conclude, then, that while the telegraph company often might be held liable to the addressee of a commercial message, it could not so be to the addressee of a non-commercial message, and that if the company be held liable on ordinary principles of negligence, recovery by the addressee will not be possible in all cases.<sup>38a</sup>

4. *Insurers*.—It has been suggested<sup>38</sup> that telegraph companies should be held liable, at least in England, by analogy to *Rylands v. Fletcher*,<sup>39</sup> as insurers against injury from the use of their ultra-dangerous commodity. The Privy Council has held that electricity is a dangerous article, and that one who uses it is an insurer under *Rylands v. Fletcher*,<sup>40</sup> but of course, when a message is delivered late or inaccurately, the plaintiff does not complain of the electricity itself, nor does his pecuniary loss or mental anguish become either greater or less because contact with a heavily charged wire would cause instant death. Besides which, if anything is well settled in electric law, it is that telegraph companies are not insurers of the prompt and proper delivery of messages intrusted to them.

5. *Duty as Public Agent*.—None of the above-suggested grounds of liability is, it is submitted, the true explanation of the addressee's right of action, and the most careful opinions have recognized that, were a telegraph company a mere private corporation, transacting a business of little importance to the public, there would be no solid legal principle upon which the addressee could sue in every case.<sup>41</sup> The public importance of telegraph companies is, we believe, the basis of their duty to deliver promptly and properly every message intrusted to them. Mr. Chief Justice Waite said in *Munn v. Illinois*,<sup>42</sup> a case which, although

<sup>38a</sup> Mr. C. J. Waite estimated that more than 80 per cent. of the messages sent are commercial: *Pensacola Tel. Co. v. W. U. T. Co.*, 96 U. S. 1, at 9, 1877. We have not been able to secure later statistics, but doubt whether the proportion has changed much.

<sup>38</sup> Merriam, *Negligence of Telegraph Companies*, 6 South. L. Rev., N. S., 321, at 344, note 3, 1880.

<sup>39</sup> L. R. 3, H. L. 330, 1868.

<sup>40</sup> *English and S. A. Tel. Co. v. Cape Town Tramway Co.*, App. Cas. 1902, 381.

<sup>41</sup> *W. U. T. Co. v. Allen*, 66 Miss. 549, 1889.

<sup>42</sup> 94 U. S. 113, at 126, 1876.

frequently criticised, is still undoubted law in our Supreme Court,<sup>43</sup> that Lord Hale, more than two hundred years before, had settled the principle that "when private property is 'affected with a public interest, it ceases to be *juris privati* only.'" In other words, when property is dedicated to the use of the public, the public has an interest in seeing that the purpose of the dedication is carried out.

We must consider whether a telegraph company does devote its property to the use of the public, and if so, the extent of the public interest in that use.

Fortunately, we need not consider the vexed question of what constitutes a public use;<sup>44</sup> for, "in the present state of civilization, it would be idle to assert that a telegraph company is not charged with a public function. The telegraph company in this case does not so assert."<sup>45</sup> So clearly has the depth of the public interest in telegraph companies been recognized, that abroad they generally are administered by the government itself, and we know that national ownership of telegraph lines in this country has been urged not infrequently.

What is the extent of the public interest in that use? The most obvious interest of the public is that the public shall be entitled to use the property, and it is from this fact that the courts have laid down the rule, without hesitation, that every individual has a right to demand that the company serve him with as great care and faithfulness as, and at a no higher price than, it serves any other individual.<sup>46</sup> But the public clearly has an interest beyond the service

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<sup>43</sup> *Cotting v. Stock Yards Co.*, 183 U. S. 79, 1901.

<sup>44</sup> See 1 Lewis, *Eminent Domain*, 165. If we may be so bold as to criticise his definition of a public use, we should question whether the right of every member of the community to use the property was not rather the consequence than the proof of the fact that the use was public. For interesting discussions of the question as to what constitutes a public use, see *Matter of Renville*, 46 App. Div. N. Y. 37, 1899, where the quotations of the New York Stock Exchange were held not to be affected with a public interest, and *Inter Ocean Pub. Co. v. Associated Press*, 184 Ill. 438, 1900, where a contrary conclusion was reached concerning the franchise of the Associated Press.

<sup>45</sup> Per Irvine, C., in *W. U. T. Co. v. Call Pub. Co.*, 44 Neb. 326, at 336, 337, 1895.

<sup>46</sup> *State ex rel. v. Del. and Atlantic Tel. Co.*, 47 Fed. 663, 1891; *State ex rel. v. Tel. Co.*, 61 S. C. 83, 1901; *State v. Tel. Co.*, 93 Mo. App. 349, 1902.

of every individual with equal care and for the same price. It has an interest that this equal care be reasonably great and that this same price be reasonably low. In both cases, reasonableness is a question of fact: reasonableness of care is for the jury; reasonableness of price, for the legislature.<sup>47</sup> But the interest of the public is equal in both cases. If, then, a telegraph company refuses to serve X. at such price as the legislature has declared reasonable, or with such care as a jury considers reasonable, it is guilty of a breach of its duty to the public. Every person in the community has a right to demand that a telegraph company transmit and deliver with reasonable speed and skill every message intrusted to it, and a failure of the company so to do is a legal wrong, an *injuria*, to every member of the public; and this, it seems to us, entirely irrespective of any statute requiring prompt and accurate transmission.

Many have been the arguments as to whether our law recognizes the condition of *injuria sine damnum*; the phrase meaning, we suppose, the violation of a legal right, not resulting in legal damage. It has been asserted that such a condition is possible, and that, like *damnum sine injuria*, it is not actionable.<sup>48</sup> Another authority maintains that it is actionable;<sup>49</sup> and a third asserts that the phrase is meaningless.<sup>50</sup> We should be inclined to agree with this last view, for it seems to us that the violation of a legal right is, in itself, damage in the eye of the law—*actual* damage, if you will, for, we take it, actual damage means nothing more than damage which is. It is, however, immaterial whether we say that *injuria* involves *damnum*, and that both are essential to a cause of action, or that *injuria* does not involve *damnum*, and that *injuria* alone is requisite for a cause of action. In either view it would seem that if the failure of a telegraph company quickly and carefully to

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<sup>47</sup> *Neb. Telephone Co. v. State*, 55 Neb. 627, 1898.

<sup>48</sup> Weeks, *Damnum absque injuria*, § 5; unless Weeks understands by the phrase a legal wrong to A., causing damage to B., in which case it would seem almost axiomatic that B. could not sue—he has not suffered any *injuria*.

<sup>49</sup> Broom, *Common Law* (9th ed.), 820; *Webb v. Mfg. Co.*, 3 Sumner, 189, 1838, per Story, J.

<sup>50</sup> Watson, *Personal Injuries*, § 9.

deliver a message be an *injuria* to every member of the community, every member should be allowed to sue—which, of course, he is not. What is the reason for this?

Let us consider a public nuisance. It is well settled that “the plaintiff cannot champion the cause of the public, and have it abated or restrained, unless it can show a special particular injury resulting from said nuisance to itself or its property, peculiar and distinct from the injury and damage which the public in general suffers from said nuisance.”<sup>51</sup> This is not because every member of the public is not injured by the public nuisance; it is because the injury to each member is so small that it could be compensated by nominal damages, and the recovery of nominal damages would encourage a useless multiplicity of suits. “The law abhors the multiplying of such suits, and has consequently taken away from all members of the community alike this cause of action in respect of nominal damages to which they may become entitled, and has substituted the remedy by indictment.”<sup>52</sup> This is merely the extension to a civil wrong of the universal rule in criminal law, that citizens sometimes must surrender their individual rights of action to a common representative, in the interests of convenience. But as was, long ago, the case in criminal law too, “if the violation of the right is accompanied by substantial injury to any member of the community, his right of action to recover damages in respect of it remains untouched.”<sup>53</sup> We must notice, then, that every member of the community has a cause for action when there is any breach of a public duty, but that, in the interests of policy, the right of action is given only to those whose damage is of an appreciable amount.

The same is true, it is submitted, in the case of a breach of public duty by the telegraph company. Every individual suffers a legal wrong from this breach, and every member of the community sustains an injury—viz., the general diminished confidence in the efficiency of this public

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<sup>51</sup> Per Toney, J., in *Louisville Mfg. Co. v. Ry. Co.*, reported from private print in 3 Amer. Elec. Cas. 236, at 265, 1890.

<sup>52</sup> Piggott, Torts, 155.

<sup>53</sup> *Ibid.*

agent—but of so small a pecuniary amount that he is not allowed to recover the nominal damages which would be compensation for the injury.<sup>54</sup> But if any individual suffer, as a not too remote consequence of this breach of duty, special damage of a kind recognized by law, he will be entitled to sue.

If our premises be sound, we have established a right of action in the addressee in every case where he suffers, as a proximate consequence of the company's breach of duty, particular damage; his cause of action, however, being founded, not on the *damage*, but on the *breach of duty*.

This reasoning, of course, would give the sender a similar right of action, and the question naturally arises, what effect will the contractual right of action which exists always in the sender, and frequently in the addressee, have on this delictual liability of the company? To speak of the tort as "founded upon contract," as is done frequently in this and, on this point, in the analogous case of a common carrier,<sup>55</sup> is, we think, confusing. The tort obligation is entirely independent of the contract obligation. True, the plaintiff cannot recover without alleging the contract, but that is because, in the nature of things, the duty cannot arise until the contract is made. Until transmission is requested there can be no duty to transmit. That the tort liability does not depend on the existence of a contract is evident from the fact that a refusal to contract is, except under extraordinary circumstances,<sup>56</sup> *per se*, a tort.<sup>57</sup> Equally independent of, although arising contemporaneously with, the contract obligation, is the public duty to transmit with due care and speed.

Were the contract, then, unconditional, it would have no effect at all on the right of action for breach of duty except on the question of the charge for transmission. But as a

<sup>54</sup> It is conceived that if a telegraph company were guilty of constant acts of negligence, its charter could be forfeited by the state: 2 Morawetz on Corps., § 1018, which proves that the negligence is a wrong to the public.

<sup>55</sup> *Serwe v. N. Pac. R. R.*, 48 Minn. 78, 81, 1892.

<sup>56</sup> Merriam, Negligence of Telegraph Companies, 6 South. Law Rev., N. S., 321, at 342, 1880.

<sup>57</sup> *Gray v. W. U. T. Co.*, 87 Ga. 350, 1891; see the analogous case of a gas company, *Coy v. Gas Co.*, 146 Ind. 655, especially at 662, 1897.

matter of fact, telegrams always are sent subject to numerous conditions, such as the stipulation that the company will not be liable for unrepeated messages, or unless claims are presented within sixty days, etc. It would seem manifestly unfair to allow a party to a contract containing such conditions to evade their force merely by changing the form of his action. We cannot here consider the validity of these conditions, although firmly convinced that, even where it is upheld, the conditions have a much greater moral, than legal, effect.<sup>58</sup> But conceding them valid, it seems clear that if the sender sued within sixty days for a breach of duty, the sixty-day limitation of action would be immaterial; and so, if he sued for the late delivery of a message, it would seem evident that the clause limiting liability for unrepeated messages should have no effect.<sup>59</sup> It would seem, therefore, logical to say that the sender or addressee could sue for breach of the public duty, and that to this action the telegraph company could set up any valid, relevant contract stipulations agreed to by the plaintiff;<sup>60</sup> such stipulations being regarded as a *pro tanto* waiver of the plaintiff's right to insist on the performance by the company of its public duty. This has been held to be the proper procedure in an action against a common carrier.<sup>61</sup>

We have proceeded this far, that the sender can sue always, and the addressee frequently, in contract; but that that which is a breach of contract is also a breach of public duty, and consequently, to the sender and addressee, as well as to every other individual in the community, a legal

<sup>58</sup> We believe that it has not been pointed out that the opinion in *Primrose v. W. U. T. Co.*, 154 U. S. 1, 1894, the last case which has held the stipulation against liability, for unrepeated messages, to furnish the company immunity even against negligence, was given by the same judge who delivered the opinion in the first important case where a similar conclusion was reached: *Grinnell v. W. U. T. Co.*, 113 Mass. 299, 1873; the late Mr. Justice Gray, a lawyer of magnificent ability, but *tenacissimus propositi*.

<sup>59</sup> *W. U. T. Co. v. Fenton*, 52 Ind. 1, 1875; *W. U. T. Co. v. Broesche*, 72 Tex. 654, 1889; *contra*, *Birkett v. W. U. T. Co.*, 103 Mich. 361, 1894.

<sup>60</sup> *W. U. T. Co. v. Yopst*, 118 Ind. 248, 1889; *Shaw v. P. T. C. Co.*, 79 Miss. 670, 1902, where, although the sender sued in tort, the action was held to be governed by the law of the place where the contract was made.

<sup>61</sup> *Boaz v. R. R. Co.*, 87 Ga. 463, 1891.

wrong, for which, however, the sender and addressee can sue only if they suffer, as a not too remote consequence of the wrong, peculiar damage of a kind recognized by the law. Our next consideration must be, what is the test of remoteness, and then, what elements of damage are recognized at law; in order to determine in what cases the sender and the addressee may sue, either *ex contractu* or *ex delicto*.

## II. THE LIABILITY FOR NON-PERFORMANCE OF THE DUTY.

### 1. *The Measure of Damages.*

In the very beginning we must notice a great distinction, from the overlooking of which great confusion has resulted,<sup>62</sup> between the necessary proximity of the injury and the legal elements of recovery. Pecuniary loss is always a legal element of recovery, and yet frequently it cannot be compensated for, because too remote; so, it may be that mental anguish is a proximate enough consequence of the injury, and yet, that it cannot be compensated for, because not a legal element of recovery. We shall consider first the necessary proximity of the result assumed to be a legal element of recovery.

(a) *In Contract*.—We have seen that the sender and addressee of a telegram may sue, in many cases, in contract. How proximate must be the injury which they suffer to the breach of contract, in order that they may recover? This question always is answered by saying that the injury must come within the rule in *Hadley v. Baxendale*,<sup>63</sup> and we must consider, therefore, the rule laid down in that case.<sup>64</sup>

<sup>62</sup> Distinction was overlooked in 1 Sutherland, *Damages* (2d ed.), 92, and this fact has caused much of the confusion in the telegraph cases—*e. g.*, in *Wadsworth v. W. U. T. Co.*, 86 Tenn. 695, 1888.

<sup>63</sup> 9 Exch. 34, 1854.

<sup>64</sup> It would be most interesting to have an essay on the measure of damages in contract before *Hadley v. Baxendale*. That rule seems to have been laid down through a lucky misunderstanding of an inaccurate statement in Sedgwick. One has only to read the report of the case in 23 L. J. N. S. Exch. 179, to see how great was the influence of Sedgwick on the decision. He was one of the American law writers best known abroad,<sup>a</sup> and his work on *Damages*, of which the second edition had just appeared in 1852, was cited four times during the argument in *Hadley v. Baxendale*. Sedgwick professed to adopt the civil law rule (see 2d ed. 112), but he seems to have misapprehended what



It seems to be this: that compensation may be had for those results of the breach of contract which a reasonable man, looking ahead at the time that the contract was made, would foresee as the likely consequences of his failure to fulfill his contract, under the then known circumstances. We must keep this clearly in mind: the test is, what a reasonable man *really* would foresee. It is very easy to consider consequences which are natural results of a breach of contract as equivalent to the consequences which an ordinary man would anticipate, and to substitute for the measure of damages in contract, viz., the usual consequences of known conditions, the measure of damages in tort, viz., the natural consequences of unknown conditions.<sup>65</sup> We see this done every day; *e. g.*, Mr. Pollock says, "the liability of a wrongdoer for his act is determined . . . by the extent to which the harm suffered by the plaintiff was the natural and probable consequence of the act. This appears to be also the true measure of liability for breach of contract."<sup>66</sup> This statement, we submit, is not accurate unless it be always true that what the jury, at the time of trial,

that rule was. He appears to have believed that the measure of damages for breach of contract in the civil law was limited to those consequences which the parties *actually* contemplated at the time that they entered into the contract, and that if, as a matter of fact, they had not looked ahead to any, there could be no recovery. Considering that contract is purely a voluntary relation, there may be more than usually is thought, to be said in favor of such a rule, and in opposition to a rule which may impose on one party to a contract greater liabilities and give to the other greater rights than either thought that he was contracting for. However, it seems clear that the latter was really the civil law view,<sup>b</sup> and Baron Alderson's famous paragraph is perhaps an exact paraphrase of it. Inasmuch as, under the civil law, any sum fixed by the parties was binding on them, as the measure of recovery, it may be doubted whether the civil law rule was well adapted to our system of law, where the tendency to hold invalid, estimates of damages made by the parties *a priori* is so strong.

<sup>65</sup> Of course, strictly speaking, perhaps nothing which happens is not natural, if that word be considered antithetical to *supernatural*. As applied to liability in tort, it should be considered as antithetical to *unnatural*. Just what unnatural signifies is not easy to state; it means more than unusual and less than not according to the law of nature; for if this latter meaning be given to it, liability would not be avoided by showing a supervening cause.

<sup>66</sup> Torts (3d E. ed.), 501.

<sup>a</sup> See the tone of his letter to Lord Bramwell, Fairfield, Memoirs of Bramwell, 29, 1898.

<sup>b</sup> Code Civil, art. 1150. Recoverable damages are those "*qui ont été prévus, ou qu'on a pu prévoir lors du contrat.*"

sees to have been a natural consequence of the breach of contract would have been foreseen by a man, at the time when the contract was made, as a consequence likely to ensue its breach. When blue litmus paper is touched with a colorless acid, any chemist would say that its change to red was entirely natural, but what ordinary man, knowing nothing of the character of litmus paper or of the acid, would think such a change of color probable? There is a great difference between results which are natural and those which a reasonable man would foresee, and the liability of one who breaks his contract does not extend beyond results of the latter kind, under the rule in *Hadley v. Baxendale*.<sup>67</sup>

Except in a very few cases, which we shall consider later, the courts from the beginning have considered the rule of damages laid down in that case as the one to be applied in actions against a telegraph company for failure promptly and properly to transmit and deliver telegrams.<sup>68</sup> We propose now to consider the three possible situations which may arise as the message discloses all the details of the transaction to which it relates, or only the nature of the transaction, or nothing about the transaction, and see what the result of applying the rule in *Hadley v. Baxendale* would be in each case. Then we shall consider whether that rule should be applied at all, in the case of telegrams, and if not, what rule should be applied.

1. If the message be a business message, and disclose in itself, or if, when it is sent, there be told to the operator, sufficient facts to enable him to know the "nature, importance or extent of the transaction to which it related, or of the position which the plaintiff would probably occupy if the message were correctly transmitted,"<sup>69</sup> it may be that if

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<sup>67</sup> Bohlen, Liability of Negligence, 40 Am. L. Reg. (N. S.) 79, 80, 81, 1901; per Deemer, J., *Mentzer v. W. U. T. Co.*, 93 Iowa, 752, 1895, quoted *infra*, p. 100.

<sup>68</sup> *Stevenson v. Montreal Tel. Co.*, 16 U. C. Q. B. 530, 1858; *Bryant v. American Tel. Co.*, 1 Daly, N. Y. 575, 1866; *Bodkin v. W. U. T. Co.*, 31 Fed. 134, 1887; *W. U. T. Co. v. Hall*, 124 U. S. 444, 1888; *W. U. T. Co. v. Wilson*, 32 Fla. 527, 1893; *W. U. T. Co. v. Odom*, 21 Tex. Civ. App. 537, 1899.

<sup>69</sup> Per Mr. J. Gray, in *Primrose v. W. U. T. Co.*, 154 U. S. 1, at 33, 1894.

the rule in *Hadley v. Baxendale* be applicable ever, to telegrams, it could be applied with propriety here.<sup>70</sup> The company knowing the nature, importance or extent of the transaction could be required, not unreasonably, to anticipate the damages which followed, not too remotely, its breach of contract; and the same would be true if equivalent details were disclosed in the case of a social message.

It is evident, however, that had the plaintiff been allowed to recover only in cases where he made known every detail of the transaction to which his message related, recoveries would have been most unusual. In many cases the very nature of the transaction requires that its details be kept secret;<sup>71</sup> and even where secrecy is not required, the expense of sending such a message would be prohibitive. Of commercial messages, it might be said, as it has of social, that "to require the family pedigree [the details of a business negotiation] to be inserted in telegrams announcing serious illness or death would deprive the greater part of the public of the benefits of telegraphy."<sup>72</sup> True, the details might be told in the "unwilling ears" of the operator, but in how many cases would the operator have time or inclination to hear them?

2. The impracticability of allowing recovery only when all of the details of a transaction are disclosed has resulted in an almost unanimous rejection by the courts of such a requirement, and the adoption of a rule which seems to hold it sufficient to warrant recovery that the nature of the business should be made known, or that enough should be shown to render it probable that some loss would follow if it were not duly delivered. It is sufficient if the message appear to be "a commercial message of value,"<sup>73</sup> or to relate to a "matter of business which, if improperly delivered, might lead to pecuniary loss,"<sup>74</sup> or to "a commercial

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<sup>70</sup> *Candee v. W. U. T. Co.*, 34 Wis. 471, 1874 (Sembler); *Beaupré v. P. and A.*, 21 Minn. 155, 1874.

<sup>71</sup> Per Guffy, *W. U. T. Co. v. Eubank*, 100 Ky. 591, at 604, 1897.

<sup>72</sup> Per Marr, J., *W. U. T. Co. v. Rosentreter*, 80 Tex. 406, at 419, 1891.

<sup>73</sup> *W. U. T. Co. v. Blanchard*, 68 Ga. 299, 1882.

<sup>74</sup> *Pepper v. W. U. T. Co.*, 87 Tenn. 554, 1889.

business transaction”<sup>75</sup> or a “pending trade,”<sup>76</sup> or if the operator should have foreseen “serious consequences”<sup>77</sup> from its careless delivery, or if enough was shown “to put an ordinary and prudent person upon inquiry.”<sup>78</sup> This view has been held, almost without exception, to be in strict accordance with the rule in *Hadley v. Baxendale*,<sup>79</sup> and has been applied, necessarily to social, as well as to commercial messages.<sup>80</sup>

A glance at a very early and at a very late case will show to what a flattering length the courts have gone in their estimation of the actual foresight of a reasonable man.

In *Squire v. W. U. T. Co.*<sup>81</sup> there was a delay in the delivery of the following message: “Will take your hogs at your offer.”

The court said that the action was *ex-contractu*, laid down the rule that “a party can be held liable for breach of a contract only for such damages as are the natural or necessary and immediate and direct results of the breach—such as might properly be deemed to have been in contemplation of the parties when the contract was entered into”<sup>82</sup>—and allowed the sender to recover the difference between the contract price, which posterity has no more means of knowing than the telegraph company had, and the market price, of 250 dressed hogs. If it be said that one looking at the message as sent would have known that “your hogs” meant 250, and not two or 2,000 hogs, not undressed, but dressed, and that “your offer” was whatever it may have been, we may ask with reason, “What manner of man is this?”

<sup>75</sup> *P. T. C. Co. v. Lathrop*, 131 Ill. 575, 1890; *W. U. T. Co. v. Carver*, 15 Tex. Civ. App. 547, 1897; *W. U. T. Co. v. Turner*, 60 S. W. 432, Tex. 1901; *Commission Co. v. W. U. T. Co.*, 74 S. W. 876, Mo. 1903.

<sup>76</sup> *Herron v. W. U. T. Co.*, 90 Iowa, 129, 1894.

<sup>77</sup> *Garrett v. W. U. T. Co.*, 83 Iowa, 257, 1891.

<sup>78</sup> *Brooks v. W. U. T. Co.*, 72 Pac. 499, Utah, 1903.

<sup>79</sup> The only doubt which we have found expressed as to the propriety of such an application is in *Bierhaus v. W. U. T. Co.*, 8 Ind. App. 246, 1893.

<sup>80</sup> *W. U. T. Co. v. Adams*, 75 Tex. 531, 1889.

<sup>81</sup> 98 Mass. 232, 1867.

<sup>82</sup> Per Bigelow, C. J., at 238.

In *W. U. T. Co. v. Birge-Forbes Co.*,<sup>83</sup> the message which was not delivered promptly enough read, "All right. Sell bluffing each described amply."

The Texas court held that a reasonable man would have foreseen, as a likely consequence of the failure promptly to deliver this message, that the sender thereby would lose the sale of 200 bales of cotton at 11 $\frac{3}{8}$  cents per pound.<sup>84</sup>

When we reach such a decision, there are but two alternatives—either the courts are not applying the rule in *Hadley v. Baxendale*, or they are interpreting that rule as making something other than the actual contemplation of a reasonable man the measure of damages. They profess to apply the rule in *Hadley v. Baxendale*, but they seem to have construed the first branch of the rule in *Hadley v. Baxendale*—that the damages "should be such as may fairly and reasonably be considered arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself"—to mean that the damages are not limited to what the parties, as reasonable persons, should have foreseen at the time when the contract was made, as consequences likely to follow its breach, but extend to all natural consequences, not too remote. If there be any difference between the measure of damages in tort and in contract, and we imagine that few would deny that there is,<sup>85</sup> we submit that the first branch of the rule in *Hadley v. Baxendale* was not meant to make the test in contract just exactly what it is in tort—viz., are the injuries complained of natural and not too remote consequences of the wrong?—and to render superfluous the second branch of that rule. The frequent suggestions in the cases, that if the telegram itself did not disclose enough of the contract, it was the operator's duty to inquire about the nature and details of the transaction to which the message related,<sup>86</sup> show that the courts have realized that no reasonable man, from the facts disclosed, would have anticipated the injury which

<sup>83</sup> 69 S. W. 181, Tex. 1902.

<sup>84</sup> See also *W. U. T. Co. v. Nagle*, 11 Tex. Civ. App. 539, 1895.

<sup>85</sup> For a vigorous statement in accord with these views, see *W. U. T. Co. v. Wilson*, 32 Fla. 527, 1893.

<sup>86</sup> *W. U. T. Co. v. Carter*, 85 Tex. 580, 1893; *W. U. T. Co. v. Turner*, 60 S. W. 432, Tex. 1901; 2 Redfield, Railways, § 189b, ¶ 19.

resulted. As to the suggestions themselves, if such a doctrine were sanctioned in the telegraph cases, consistency would require its application of every action of contract, and would substitute a rule entirely different from any heretofore known in these actions.

3. That such a new rule was not intended to be sanctioned is evident from the fact that the very court which has urged it most has refused to apply it to the case of cipher messages.<sup>87</sup> If the message disclosed that some loss will follow its careless delivery, *Hadley v. Baxendale* is held to warrant the recovery of all the damage, not too remote, which follows; but if the message be in cipher, only nominal damages can be recovered. If the operator be under a duty to require the further information in any case, one would have thought that he would be so bound when the message was entirely unintelligible to him, and one might have thought, even, that if the anticipation of some injury alone be required to bring the case within the rule of *Hadley v. Baxendale*, the mere fact of the message having been sent in cipher should cause such anticipation in the mind of a reasonable man. One cannot but feel surprised that so practical a judge as Dixon, C. J., should say that an operator might presume that a cipher message was "a mere item of news, or some other communication of trifling and unimportant character."<sup>88</sup>

However, except in Virginia,<sup>89</sup> Alabama,<sup>90</sup> Georgia,<sup>91</sup> Kentucky<sup>92</sup> and probably Mississippi,<sup>93</sup> the sender or ad-

<sup>87</sup> *Davidson v. W. U. T. Co.*, 39 S. W. 605, Tex. 1897.

<sup>88</sup> *Candee v. W. U. T. Co.*, 34 Wis. 471, 1874, at 480. In *Saunders v. Stuart* (L. R. I. C. P. D.), 326, 1876, the operator admitted that he knew the cipher telegram to be a business message, and yet only nominal damages were allowed to the plaintiff; but in *W. U. T. Co. v. Bell*, 24 Tex. Civ. App. 572, 1900, the operator was alleged to have known the importance of the cipher message, and although the court did not comment on the fact that the message was in cipher, it considered the question as though that fact would have had no effect on the right of recovery.

<sup>89</sup> *W. U. T. Co. v. Reynolds*, 77 Va. 173, 1883.

<sup>90</sup> *Daughtery v. Am. Tel. Co.*, 75 Ala. 168, 1883.

<sup>91</sup> *Dodd Co. v. P. T. Co.*, 112 Ga. 685, 1901.

<sup>92</sup> *W. U. T. Co. v. Eubank*, 100 Ky. 591, 1897 (dictum).

<sup>93</sup> *Shingleur v. W. U. T. Co.*, 72 Miss. 1030, 1895. See dissenting opinion in *Shaw v. P. T. Co.*, 79 Miss. 670, at 695, 1902; *P. T. Co. v.*

dressee of a cipher message can recover only nominal damages for its late or inaccurate delivery.<sup>94</sup> The courts allowing recovery of full damages either reject altogether the rule in *Hadley v. Baxendale*—in the Daugherty case, Baron Alderson's language was declared "in itself inapt and inaccurate"—or else that rule has been considered as sanctioning recovery for all natural consequences, not too remote.<sup>95</sup> The great majority of courts, seemingly forgetful that in the cases like the Squire case, or the Birge-Forbes Company case, they were in *pari delicto*, have denounced with vigor this interpretation of the rule. "The assertion as a rule of law that one party to a contract shall *alone have knowledge* that a breach of that contract will directly result in the loss of thousands of dollars, and that upon such breach he can recover, of the other *party to the contract*, all of such, to him, *unforeseen, unexpected, un contemplated, non-consented-to* damages, seems to us to be a complete upheaval of all the old land-marks in reference to damages upon broken contracts, and the establishment of a *new rule*, that is neither fair, just nor equitable; and which, if it is to be applied to the broken contracts of telegraph companies, must also, according to every principle of consistency, be applied under like conditions to every violated contract."<sup>96</sup>

This, it seems to us, is sound argument, and we cannot but ask ourselves why it was not applied in the case of messages which, although not in cipher, are so condensed that they give as little information as if they were. Certainly the suggestion that recovery is denied in the case of a cipher message, because no one but the sender and the

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*Rhett*, 33 S. 412, Miss. 1903; Florida adopted that view originally, *W. U. T. Co. v. Hyer*, 22 Fla. 637, 1886; but later overruled the Hyer case, *W. U. T. Co. v. Wilson*, 32 Fla. 527, 1893; in Pennsylvania, *W. U. T. Co. v. Landis*, 21 W. N. 38, 1888, is overruled practically by *Fergusson v. Anglo-Am. Tel. Co.*, 178 Pa. 377, 1896.

<sup>94</sup> *W. U. T. Co. v. Candee*, 34 Wis. 471, 1874; *P. T. Co. v. Lathrop*, 131 Ill. 575, 1890; *Primrose v. W. U. T. Co.*, 154 U. S. 1, 1894; *Fergusson v. Anglo-Am. Tel. Co.*, 178 Pa. 377, 1896; *Lumber Co. v. W. U. T. Co.*, 44 S. W. 309, W. Va. 1903 (doubting the propriety of this prevailing doctrine).

<sup>95</sup> *W. U. T. Co. v. Way*, 83 Ala. 542, 1887.

<sup>96</sup> Per Taylor, J., in *W. U. T. Co. v. Wilson*, 32 Fla. 527, at 532, 1893. (Italics are those of court.)

addressee knowing its real meaning, they could fraudulently give to it whatever signification would enhance their damages most,<sup>97</sup> would apply quite as much to a message like the one in the Squire case.

Whether the message be in cipher, or in language so brief that all the details of the transaction to which it relates are not disclosed, we believe that under *Hadley v. Baxendale* recovery must be limited to nominal damages, for no reasonable man would have anticipated the injury which actually occurred.

But we further believe that for two substantial reasons the rule in *Hadley v. Baxendale* should not be applied in these telegraph cases.

1. Many of the actions are brought for inaccuracy in the transmission of messages. Let us take such a message as this:—

“Buy me 5,000 bushels of corn at 57 cents per bushel.”

If that message be not delivered at all, it is not difficult to foresee what damage will be suffered. So, if it be delivered late; an exact estimate of the damage cannot be made, it is true, for the market is not invariable, and the length of the delay cannot be foretold. But at any rate, an approximate estimate can be made—as close a one as can be made in the case of other contracts. But suppose that the message be transmitted inaccurately. The questions to which such a contingency would give rise are different manifestly from those which can arise in any other department of the law of contracts; and yet, the courts, apparently without hesitation, have gone on applying “systems that are not similar and principles that are not analogous” until one wonders whether the “reasonable man” of *Hadley v. Baxendale* could be anything less than an omniscient divinity.

The possible changes in the message are as numerous as are the words of the English language.<sup>98</sup> “Buy” may be

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<sup>97</sup> *Fergusson v. Tel. Co.*, 178 Pa. 377, 1896.

<sup>98</sup> Although, of course, if the inaccuracy be so great as to put the sendee on notice that a mistake was made, he cannot act on the message and hold the company liable for the damages: *Germania Fruit Co. v. W. U. T. Co.*, 70 Pac. 658, Cal. 1902.



come "sell"; "5,000" may become "50" or it may become "50,000"; "57" may become "50" or it may become "67"; "corn" may become "oats"; "pears" has become "peaches";<sup>99</sup> "Twenty-two" has become "Thirty-three";<sup>100</sup> "Valley Falls" has had every letter changed and become "Neosha Falls";<sup>101</sup> a message sent, "Mother started at nine," was received, "Mother died at nine."<sup>102</sup> In view of the utter impossibility of foreknowing how a message may be altered in transmission, it is submitted that the rule of *Hadley v. Baxendale* should not be applied to this class of telegraph cases at least.

2. But there is a broader consideration which, we feel, should operate to prevent the application of *Hadley v. Baxendale* to these telegraph cases at all; and this consideration does not concern the anticipation of the parties. The contract which the sender makes with the telegraph company is to transmit a message, and it is not to buy or to sell merchandise; and it seems unfair that the liability of the telegraph company should depend absolutely on the terms of the contract which the sender may desire to make with the addressee, and in which the company has not the slightest interest. It is repugnant to what we conceive to be the law of contracts, that A. and B., by the contract they make, shall be able, without any apparent restriction, to extend or to diminish the liabilities of C., who stands in no relation whatever, as to the contract, to either A. or B. It is well settled in the case of a common carrier that if he carry carelessly goods which the consignor had told him were being sent to fill a sub-sale, the consignor, if the sub-sale be lost owing to this negligence, can recover his loss of profits, if the sub-sale were at the market price, and if the price to be paid were extraordinarily high, the consignor can recover even those unusual profits, if only he have informed the carrier that the profits would be unusually high; but this rule we believe on principle very question-

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<sup>99</sup> *W. U. T. Co. v. Cook*, 61 Fed. 624, 1894.

<sup>100</sup> *W. U. T. Co. v. Richmond*, 19 W. N. C. 569, 1887.

<sup>101</sup> *W. U. T. Co. v. Crall*, 38 Kans. 679, 1888.

<sup>102</sup> *W. U. T. Co. v. Hines*, 22 Tex. C. I. V. App. 315, 1899; and see *W. U. T. Co. v. Patton*, 55 S. W. 973, Tex. 1900.

able, and we doubt whether *Hadley v. Baxendale* was intended to sanction it.<sup>103</sup> That rule should be limited to cases where, as the liability on one party to the contract increases by reason of his knowledge of the increased risk, he is able to demand greater compensation from the other party for assuming the risk, or be able to refuse the contract altogether. The court assumed in *Hadley v. Baxendale* that the common carrier had such power; "had the special circumstances been known, the parties might specially have provided for a breach of the contract, by special terms as to damages in that case; and of this advantage it would be very unjust to deprive them." Whether this was or is the fact as to common carriers, we have seen that it is emphatically not so as to telegraph companies. If you write out a message—

"Buy 10 shares Steel,"

and then write out another—

"Buy 10,000 shares Steel,"

and ask the operator to send both, he must send them, and may not charge you more for sending the second than for sending the first; and yet, in the latter case, you have multiplied the potential liability, *i. e.*, the risk, of the company 1,000 times. It cannot be denied that any reasonable man would contemplate that the risk was thus increased 1,000 times, but what avails him his ability to *contemplate*, if he have no ability to *avert*, the danger. It is merely a question whether a man condemned to walk from the Tarpeian Rock prefers doing so blindfold or with his eyes open. If his eyes are open, he can see when he reaches the edge of the precipice, but what good does that do him, if he must walk ahead? It has been suggested that the notice of the increased risk does help the company in this, that it is enabled to take greater care in dealing with the message; *e. g.*, it might repeat it.<sup>104</sup> Without intending to be cap-

<sup>103</sup> Cf. Mayne's criticism of the rule, *Damages* (6th ed.), 31, and his third suggested rule, 41: "Where the defendant has no option of refusing the contract, and is not at liberty to require a higher rate of remuneration, the fact that he proceeded in the contract after knowledge or notice of such special circumstances is not a fact from which an undertaking to incur a liability for special damages can be inferred."

<sup>104</sup> *W. U. T. Co. v. Wilson*, 32 Fla. 527, 1893; *Cannon et al. v. W. U. T. Co.*, 100 N. C. 300, 1888.

tious, one cannot but suggest that if knowledge of the importance of the message would stimulate the operator's care, it would be very likely equally to excite his apprehension and so his nervousness. Again, there are so many cases in which repetition would be useless, that that expedient would protect the company in few cases. If the sender himself paid for repetition, it would seem that the notice to the company would not enable it to protect itself any further at all. And finally, what consideration does the sender of a most valuable message give, more than the sender of an unimportant one, which should require the company at its risk to adopt extraordinary precautions for its safety? Is it a defense to any action for breach of contract that the defendant did the work which he contracted to do, carelessly, because he had no notice that it was important work? No; the law says that in the transmission of all messages the company must use an equal amount of care, and to say that if the importance of the message be known to it, its obligation is to use greater care, is, it seems to us, an assertion, practically, that a nude promise is binding.<sup>105</sup>

If it be true that "in matters of contract, the damages to which a party is liable for its breach ought to be in proportion to the benefit he is to receive from its performance,"<sup>106</sup> we submit that as long as telegraph companies are bound to transmit without discrimination and with equal care every message given to them, at uniform rates, the principle that their liability is increased by a notice which in no way increases their rights should not be applied.<sup>107</sup>

From these two considerations, we submit that even if in the telegraph cases more than nominal damages could be recovered by an application of the rule in *Hadley v.*

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<sup>105</sup> Pollock, Torts (3d ed. English), 502, note o.

<sup>106</sup> Mayne, Damages (6th ed.), 10, 11.

<sup>107</sup> It will be a good day for the law when we have a scientific discussion of the part which notice plays in regulating liability. We should not be surprised if it should be established some day that notice was originally only a circumstance which affected a man's conscience, and that its effect should be limited to cases of purely equitable character, where the state of a man's conscience is the moving influence.

*Baxendale*, that rule should not be applied; hence, that if the sender or addressee sue in contract, he should not recover more than nominal damages.

(b) *In Tort*.—We have seen that he has a cause of action in tort, provided he have suffered as a consequence, admissible under the measure of damages in tort, injury recognized by the law. Leaving for later consideration what elements of injury are so recognized at law, we must consider in what relation the injury must stand to the wrong, to be recoverable for in tort.

In tort, a plaintiff may recover for all legal elements of injury which result naturally and not too remotely from the wrong. It has been deplored that a rule so vague must be adopted, but the necessity for such indefiniteness arises from the nature of the case. It is not, as a rule, difficult to say whether any particular injury is a natural consequence of the wrong, if we regard natural as meaning according to the course of nature under normal circumstances. The mere occurrence of an injury makes that injury a natural consequence within the rule, unless it be shown that an external force, usually a natural force but one under ordinary circumstances dormant, intervened and directed the course of events to a result unusual in a normal condition of nature. It is much more difficult to determine what consequences are not too remote. One cannot say just where the line should be drawn between what is and what is not sufficiently proximate, but it is ordinarily not difficult to decide whether a given consequence is or is not. As in looking through a field-glass, it is almost impossible to say just where one's ability to distinguish objects stops, and yet it is easy to tell whether a given object be or be not within the range of vision. But we need not consider the question of necessary proximity here. The measure of damages both in tort and in contract assumes that the injury in question is not too remote. We found that the loss from the late or inaccurate delivery of telegrams was in very few cases a loss which the parties would have anticipated as reasonable men. Is the loss a natural result of the non-delivery or of the careless delivery of a message? If "Narreenda" means "Buy

500 bales of cotton," is not a loss of profits on 500 bales of cotton just as *natural* a loss from the non-delivery of the telegram, although *not* a result *which could have been anticipated* so well, as if the message had read, "Buy 500 bales of cotton?"<sup>108</sup> As soon as we leave the hypothetical question, "would a reasonable man have anticipated this injury?" and come to the question of fact, "is this injury a natural consequence of the wrong?" it seems to us that nine-tenths of the difficulties which we have been considering disappear. Be the message a full exposition of the transaction, be it so brief as to be unintelligible, or be it in cipher, and be the wrong complained of the non-delivery, or the late delivery, or the inaccurate delivery of the message, the injury suffered is equally natural, and, if not too remote, is equally recoverable for.

It will be objected, of course, that this rule imposes on the telegraph company an even greater hardship than does the misapplication of the rule in *Hadley v. Baxendale*, and that any criticism of the application of that rule on the ground that it increases the liability, without increasing the rights of the company, could be made with even greater propriety to the adoption of this view. This objection overlooks the fundamental distinction between the nature of liability in contract and liability in tort, based on the fact that contractual liability is, as has been said, "the child of consent," while delictual liability is imposed without any consideration of the obligee's willingness to assume it. The liability which surrounds certain *status*, whether the *status* themselves be entered into voluntarily or not, is entirely "the child of law," so to speak. If two men unlawfully strike two boys with equal force, and one boy drops dead because of an extraordinary and unknown physical condition, while the other boy runs off unharmed, there is no ethical reason, perhaps, why one man should be imprisoned for life and the other man let off with a light fine. And yet, we can see that there is an ethical basis for

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<sup>108</sup> Mr. Pollock falls into the curious error of asserting that since a company would have no notice of the probable consequences of the inaccurate transmission of a cipher message, therefore such consequences would be too *remote*: *Torts* (3d English ed.), 498. How could *notice* make sufficiently *proximate* that which is too *remote*?

the attitude of the law which brings about this result. Every man is different from every other man—that is the work of God—and to hold that A., who was made weak and dependent, should be entitled to no more protection than would keep altogether harmless B., who was created strong and well able to take care of himself, would be as impolitic as it would be uncharitable.<sup>109</sup> However, the rule is unquestionable, that in tort the defendant's liability for a wrongful act is not limited to consequences which, as a reasonable man, he should have foreseen, but extends to "all the injurious results which flow therefrom by the ordinary natural sequence, without the interposition of any other negligent act or overpowering force."<sup>110</sup>

Nor is the company entirely unprotected. First of all, it has the immense protection of the rules against remoteness, and against intervening causes. Second, it has the protection of any valid conditions of the contract entered into with the sender, and if the sender represented the addressee in making the contract, the latter can no more escape the effect of these conditions, by suing in tort, than could the sender by a similar change in the form of his action.<sup>111</sup> If, however, the addressee bear no contractual relation to the company, the company, of course, cannot set up, to defeat his action, conditions of contract between it and the sender.<sup>112</sup>

We have finished now two parts of our subject. We have found that a telegraph company is always in a contractual relation to the sender of a message, and frequently to its addressee; but that, by virtue of the public nature of its duty, it is invariably under a delictual liability to both, and

<sup>109</sup> It would seem, if this ethical consideration be the true basis for the rule, that a man whose weakness was due to his own vice should be entitled to less protection than one whose weakness is inherent. Although such is not the law, *Maguire v. Sheehan*, 117 Fed. 819, 1902, we take it that this is due rather to practical difficulties of proof than to any theoretical stand of the court.

<sup>110</sup> Quoted per Ladd, J., in *McPeck v. W. U. T. Co.*, 107 Iowa, 356, at 362, 1899.

<sup>111</sup> *Coit v. W. U. T. Co.*, 130 Cal. 657, 1900; *W. U. T. Co. v. Waxelbaum*, 113 Ga. 1017, 1901; *Young v. W. U. T. Co.*, 65 S. C. 93, 1903.

<sup>112</sup> Bigelow, L. C., on Torts, 624, 1875; *Tobin v. W. U. T. Co.*, 146 Pa. 375, 1892 (Question: was not the sender the sendee's agent?); *W. U. T. Co. v. James*, 162 U. S. 650, 1896.

either sender or addressee may sue on this cause of action if he suffer, within the limit of necessary proximity, damages of a kind recognized by the law.

We attempted to show, then, that suit on the contractual liability of the company would be little protection to either sender or addressee, because, according to the proper measure of damages in contract, only nominal damages should be recovered; but that in tort, there could be a substantial recovery.

We come finally to the most difficult part of our subject, and the one which has been a continual battleground of jurisdictions: Granted that the sender or the addressee can sue in tort and that he can recover for injuries naturally, and not too remotely consequent on the wrong, the question remains, for what injuries so situated can he recover? In other words, what injuries does the law recognize as legal elements of damage?

## 2. *The Elements of Damages.*

(a) *In Contract.*—Although, as we have attempted to indicate, we believe that a substantial recovery in an action on the company's contractual liability cannot be given consistently with legal principles, it must be admitted, nevertheless, that many courts have allowed substantial recoveries in such actions; and to trace our subject to its conclusion, we must consider how they have considered the problem of the legal elements of damage in contract actions.

Physicians, scientists, clergymen, statesmen would all tell us of different kinds of possible injuries which a man could suffer, but interesting as it might be to attempt a list of these injuries, we must content ourselves with a very rough division of them into three classes—emotional, physical and pecuniary. Now, in dealing with breaches of contract, the law might have taken the view that if a reasonable man would have anticipated that any of these classes of injuries would result from a breach of his contract, and any did result as a consequence not too remote, he should be liable for it. This would be, in effect, to say that all kinds of damage which come within the limit of

*Hadley v. Baxendale* are legal elements of damage; that that case supplies the test, not only of the extent, but of the elements, of damage recoverable. Many of the cases in which a plaintiff, suing in contract, has been allowed to recover for emotional injuries, due to the careless delivery of a telegram, have gone on this ground; mental anguish can be recovered for, because it was "caused by the breach of the contract, and was contemplated as a part of the consequences of such breach at the time the contract was entered into."<sup>113</sup> On principle, this result seems logical and proper, and the ease with which it can be applied, as well as its evident justice, make one wish that the law had adopted it.<sup>114</sup>

It is well settled, however, and almost universally conceded, that "direct pecuniary loss" is the only element of damage recoverable in an action *ex contractu*. How the rule came to be established has not been explained satisfactorily. To say that the court always retained the power of construing contracts, and that it therefore could and did limit the elements of damage which the jury could consider, may be true, but it is not sufficient. It does show that the early judges considered pecuniary loss the only element of damage which the law ought to recognize, but it does not give any hint of the premises upon which they built to reach this conclusion. Why should the court have tried to prevent the jury from recompensing a plaintiff who suffered other than pecuniary injury from a breach of contract? We believe that there were three reasons:

<sup>113</sup> *The W. U. T. Co. v. Simpson*, 73 Tex. 422, at 426, 1899.

<sup>114</sup> The courts allowing recovery for mental anguish have applied the rule consistently to other than telegraph cases: *R. R. v. Hull*, 68 S. W. 433, Ky. 1902; *Dunn v. Smith*, 74 S. W. 576, Tex. 1903 (a most interesting case where, the plaintiffs being joint contractors, a joint recovery for mental anguish was sustained). The latter class we do not consider good illustrations of the position, because in all of them the recovery can be supported on the ground that the action is really *ex delicto*. *S. S. Co. v. Wood*, 18 Pa. Sup. 488, 1901, shows how easy it is to fall into this position. The court, and even the eminent counsel for the defendant, seem to have had no doubt but that if physical injury was such a consequence of a breach of the contract as the party should have foreseen, it was a recoverable element of damages. This would be all right in Texas or Kentucky, but we cannot think that our Pennsylvania courts are going to make the elements of recovery in contract the same as those in tort. Still, *Hobbs v. Ry.*, L. R. 10 Q. B. 111, 1875, seems to take that view.



First, the infrequency of cases, when a breach of contract caused other than pecuniary results which were not too remote to be recoverable, even had they been considered legal elements of damage; secondly, the difficulty of ascertaining the exact pecuniary equivalent for any but a pecuniary loss, and thirdly, and, we believe, most important, although least tangible, the early conception of the court as a kind of Spartan parent, totally lacking in what Kent calls "the fine feelings of social sympathy." The judges, like the surgeons, did their work without anæsthetics. If the community in general has grown more materialistic since those early days, we cannot but feel that the courts have grown less so.<sup>115</sup> However that may be, the rule is fixed, and fixed, we believe, without exception, unless the action for breach of promise of marriage be considered an ordinary action *ex contractu*.

So much has been made of these actions by the cases which assert that the elements of damage in contract may consist of other than pecuniary losses that it becomes necessary to consider their real nature. Are they really actions *ex contractu*? If so, did the court intend to lay down in them a measure of damages different than that applied to other contract actions? In considering this latter question, we must not forget that the measure of damages in contract was not at all definite until *Hadley v. Baxendale*, and that a scientific consideration of this part of the law was not begun until Sedgwick's time.

Originally the action was treated as strictly *ex contractu*, and damages were restricted to the plaintiff's temporal loss. "Here is a temporal loss, and therefore a temporal action doth lie," said the court in next to the earliest reported case of breach of promise,<sup>116</sup> and the same thought was expressed in the leading early case on the subject.<sup>117</sup> The action developed strictly on contract principles for a

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<sup>115</sup> "The common law of to-day recognizes and protects numerous rights which were ignored in the ruder ages of its history. Our savage progenitors were not a sentimental people, and their common law knew no wrong that did not wound the person or injure the property." Editor in 5 Va. Law R. E. G. 711, 1900.

<sup>116</sup> *Baker v. Smith*, Style 295, 1651.

<sup>117</sup> *Holcroft v. Dickinson*, Carter, 233, 1672.

long time, and not until 1796, we believe, was any departure made therefrom.<sup>118</sup> Lord Kenyon decided then that the physical infirmity of the intended husband entitled the wife to refuse to marry him, without subjecting herself to damages for breach of contract. This was clearly a necessity of public policy, but it in no way affected the question of the measure of damages. It must be admitted, however, that the practice in England since that time has, in respect to the measure of damages, been at variance with what we are accustomed to consider the correct measure in contract. But outside of this fact, we believe the action for breach of promise of marriage to be an action strictly *ex contractu*,<sup>119</sup> and we feel that the conditions which gave rise to the exceptional measure of damages have disappeared to a great extent; so that within a few years the measure of damages will be quite as strict in case of breach of the marriage contract as in case of the breach of any other contract. There are only two reasons why suits of this character are brought: First, for money, and second, for vindication of the loss of virtue. In the former case there is no reason why the damages should not be limited, as in other contract actions, to the woman's pecuniary loss; her "loss of market," as it was called in Scotch law. In the latter case, the action is in reality for seduction, and although the form of action is preserved as *ex contractu*, in order to enable the woman to sue, the whole case is tried as if it were an action for seduction. It is really an action by the person seduced herself. Lord Herschell, whose pet aversion the action for breach of promise was, tried time and again to have the action abolished altogether,<sup>120</sup> and as there are multiplied statutes which make seduction under promise of marriage a mis-

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<sup>118</sup> *Atchinson v. Baker*, 2 Peake, 103, 1796.

<sup>119</sup> It survives as action *ex contractu*: *Finlay v. Chirney*, 20 Q. B. D. 494, 1887; a case which is usually said to have established that an action for breach of promise does not survive, but which really held that, like any other contract action, it did survive as far as it was brought to recover pecuniary loss; *vide* at 507. Its performance is excused under same circumstances as is that of ordinary contract: *Hall v. Wright*, 1 E. B. & E. 746, 1858; *Smith v. Compton*, 55 Cent. Law J. 409, N. J. 1902.

<sup>120</sup> 2 Canada Law Rev. 92, 1902.

demeanor,<sup>121</sup> or allow a woman seduced to sue,<sup>122</sup> or her father to sue without proving loss of service,<sup>123</sup> the conditions which gave rise to the abnormal measure of damages in actions which were really for seduction are disappearing, and the measure of damages will ultimately become what it was from the beginning until within a century ago, viz., the usual measure of damages according to the rule in *Hadley v. Baxendale*.<sup>124</sup>

Hence we feel comparatively safe in saying that, until the telegraph cases arose, there was no action really treated as an action *ex contractu* in which damages could be recovered, except for pecuniary injuries; and we cannot but feel that had the courts which allowed recovery for mental anguish in the telegraph cases admitted this fact, their decisions would have obtained a more respectful consideration. For it is well settled, and none of the courts denying recovery in the telegraph cases have denied it, that mental anguish was a legal element of damages in certain tort actions,<sup>125</sup> and it is by an examination of these that we think justification may be found for the so-called Texas rule.

(b) *In Tort*.—The most perfect analogy to the telegraph cases, it seems to us, is in the action for seduction. We all know how, despite endless criticism, the cause of action in such cases is a loss of service to the plaintiff as a consequence of the defendant's wrong. Many had hoped that the reaction which the legal mind of to-day is undergoing to the specious fictions which so pleased and satisfied law-

<sup>121</sup> Rev. St. N. J. 1295; Penal Code, § 284; Penal Code Cal. § 268; Code of Va. 1887, § 3679; Pa. 1 P. & L. Dig. Col. 1326; and others.

<sup>122</sup> Code Ind. § 264; Rev. 1901; Code Iowa, 1897, § 3470; Code Tenn. 1896, § 4501; Ball. Ann. Code, Wash. § 4831; and others.

<sup>123</sup> Code Ind. Rev. 1901, § 265; Ball. Ann. Code, Wash. No. 4830; Code W. Va. 1899, C. 103, § 1; and others.

<sup>124</sup> For a strong advocacy of these views see White, Breach of Promise, 10 Law Quarterly, 135, 1890.

<sup>125</sup> When we consider that "Assumpsit was an action *ex delicto* perverted into a contractual remedy" (Salmond, History of Contract, 3 Law Quarterly, 166, at 171, 1887), it does seem illogical that the elements of damages should be different in tort and in contract. Perhaps one cannot do better than to repeat Halsbury's words respecting the theory which allows suit by an undisclosed principle: "If it is said it is an anomaly, it certainly is not the only one in our law": *Maxsted Co. v. Durant*, App. Cas. 1901, 240, at 244.

yers of a few centuries ago would lead to a change in the theory of this action; but the old rule has been reasserted with full force,<sup>126</sup> and relief, it seems, must be obtained through legislation.<sup>127</sup> And yet, when we consider the case a little, the theory does seem not illogical. Certainly the woman herself could not sue. "She cannot complain of that which took place by her own consent. Any different rule would be an anomaly."<sup>128</sup> Could her natural guardian, usually her father, sue? If so, it must be in his own right; the consent to the wrong, which barred the woman's right, would bar any claim by another in her right. What interest which the law could protect had the father, that the seduction should not occur? The court, it may be, could have said that it would protect his right not to be "injured as the head of a family," as Mr. Pollock suggests.<sup>129</sup> But, with submission, this principle is too vague for practical use, unless injury to a man as head of a family mean—and Mr. Pollock himself seems to think that it does—a wrong, the proximate consequence of which is a loss of society or service.<sup>130</sup> And if it do mean that, is the position suggested much different than that which the law actually has taken? We suppose that seduction does not deprive a man of his daughter's society in a legal sense; so that, even on Mr. Pollock's theory, recovery could be allowed only where the proximate consequence of the wrong was a loss of service. The father's mental anguish and humiliation were, it must be admitted, an equally proximate consequence of the wrong, and the conclusion reached by the courts certainly proves that the infliction of this mental anguish was not considered a cause of action. And yet, once the cause of action is established, the circuit between injury and recovery is closed, and the men-

<sup>126</sup> *Whitbourne v. Williams*, 2 K. B. 722, 1901; *Hamilton v. Long*, 36 Irish Law T. 189, 1902.

<sup>127</sup> It has been claimed that under the Code the fiction of service is not required to be proved or even averred: *Snider v. Newell*, 44 S. E. 354, N. C. 1903, per Clark, C. J.

<sup>128</sup> Pollock, *Torts* (3d Eng. ed.), 208.

<sup>129</sup> *Ibid.*, 209.

<sup>130</sup> *Ibid.*, 207-8. "The same rule should extend to any wrong done to a wife, child or servant, and followed as proximate consequence by loss of their society or service."

tal anguish does become an element of damages. That the law of Torts has lagged here behind the law of Damages<sup>131</sup> is undeniable, and yet this is not the only instance in which the same thing has occurred. We know how long it was before malice, always recognized as an element of damages, was recognized in any case as a cause of action. We know how long it was before Beven's theory, that the liability for established negligence extends to results considered too remote to be considered in establishing negligence, was accepted.<sup>132</sup>

We are not unaware that the admission of this mental anguish as an element of damages in actions of seduction frequently is explained on a view which destroys its use as an illustration for the view for which we are contending, viz., that the damages awarded are punitive, and hence elements are admitted which the court would exclude, were the damages compensatory only.<sup>133</sup> But we feel that this overlooks the circumstances under which exemplary damages are awarded and the nature of the parent's action. The rule which Sedgwick laid down for the imposition of exemplary damages was, "Where gross fraud, malice or oppression appears, the jury are not bound to adhere to the strict line of compensation."<sup>134</sup> In other words, a plaintiff may recover such damages only when the defendant has acted toward him with gross fraud, malice or oppression. The turpitude of the crime of seduction is, of course, enormous; but wherein, in its commission, is the element of "gross fraud, malice or oppression" *to the plaintiff*, who is *not the woman seduced, but her father?* Could the daughter sue, it may be that those elements could be found in every case, but only in most exceptional cases, it would seem,

<sup>131</sup> *Chapman v. W. U. T. Co.*, 88 Ga. 763; see 774, 1892.

<sup>132</sup> Bohlen, Negligence, 40 A. M. Law Reg. (N.S.) 79, at 85, 161, 1901.

<sup>133</sup> *International Ocean Tel. Co. v. Saunders*, 32 Fla. 434, 1893; *Connelly v. W. U. T. Co.*, 4 Va. Sup. C. T. 6, 1902. Mr. Greenleaf, in his famous controversy with Mr. Sedgwick, as to the nature of what the latter had called punitive damages, asserts that the damages for mental anguish, in seduction, are compensatory: 9 Law Reporter, 529, at 541, 1847. Inasmuch, however, as Mr. Greenleaf denied that damages could be ever anything but compensatory, we should not be justified in claiming his support for our position.

<sup>134</sup> Damages (2d ed.), 454.

could the father prove that the crime was committed with fraud or with malice against *him*. The damages are strictly compensatory.

If our reasoning be sound, the action of seduction furnishes an instance in which a cause of action in tort having been established, mental anguish resulting from the tort, naturally and not too remotely, is an element of damages for which the law gives compensation.

Damages for mental anguish are recoverable also in actions for false imprisonment,<sup>135</sup> malicious prosecution and assault with or without<sup>136</sup> battery. In each of these cases, there exists a cause of action independent of the mental anguish; and in all of them, recovery is allowed for that mental anguish. These cases have been explained away by the courts which refused to accept the Texas rule on two grounds:—

1. In tort actions, the jury necessarily has a very wide discretion, and the courts have an aversion, inherited from an original incapacity, to set aside verdicts, even though convinced from their size that forbidden elements of damage have been considered by the jury. If these verdicts have been allowed to stand only because the court felt itself unable to say that they were incorrectly reached, it is submitted that the court never would have instructed the jury that it was its duty to consider the alleged inadmissible elements of damage; as it does constantly.

2. These torts are willful, and so entirely unlike a telegraph company's carelessness, and the damages are punitive.<sup>137</sup> This objection, we think, comes from a confusion of the cause of action with the elements of damage. The willfulness is essential to the establishment of the cause of action, and has nothing to do with the question of damages. Look at a few illustrations of what constitutes an assault, for instance: "If a man strike at another, and do not touch him, . . . so, if he lift up his weapon to strike, but does not. . . . If he throw stones, water or other liq-

<sup>135</sup> *Butler v. Stockdale*, 19 Pa. Sup. 98, 1902.

<sup>136</sup> *Kline v. Kline*, 64 N. E. 9, Ind. 1902.

<sup>137</sup> *W. U. T. Co. v. Ferguson*, 157 Ind. 64, 1901.

<sup>138</sup> Comyns, title "Battery" (C).

uor upon him"; evidently willfulness is inherent in the action; and to say that damages are recoverable for mental anguish because the act is willful is merely to say that damages are recoverable for mental anguish because the act, being willful, is an assault; which is what we have attempted to prove—that a cause of action being established in tort, mental anguish is an element of damages therefor.

The courts following the Texas doctrine have relied frequently on those cases where nervous shock or mental anguish accompanies physical injuries caused by a defendant's negligence; but the courts which allow recovery in such cases so uniformly place their decisions on the impossibility of separating the physical injury and the mental shock that we fear it is unfair to consider these cases as supporting the view that the courts regard mental anguish as an element of damages. The courts rejecting the Texas doctrine, on the other hand, rely with equal frequency on the cases in which physical suffering consequent on nervous shock caused by the defendant, without actual impact, has been held not actionable. These cases are evidently dissimilar, for the question in them is whether the shock, or, to be more accurate, the ensuing physical injury, be a cause of action, and not whether it be an element of damages when a cause of action exists.<sup>139</sup>

If, then, it be true that where there exists a right of action in tort, mental anguish, which is a natural and not too remote consequence of the act which gives the right of action, is an element of damages which should be compensated for, must we not conclude that a telegraph company which is guilty of a breach of its public duty, whenever, through negligence, it fails to deliver messages promptly and accurately, should be liable to the sender or to the addressee for mental anguish which is a not unnatural or too remote consequence of this breach of duty? This

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<sup>139</sup> In view of the very general citation of the court, adopting what we may call, more for convenience than with accuracy, the "Northern" rule, of *Coultas v. Commissioners*, L. R. 13, App. Cas. 222, 1888, it will be interesting to note how they will treat the contrary decision of *Dulieu v. White*, L. R. 2 K. B. 669, 1901. Massachusetts too, formerly counted consistent advocate of the rule in the *Coultas* case, seems to be wavering: *Homans v. Ry.*, 180 Mass. 456, 1902.

breach of duty gives a cause for action to every individual in the community which bestows upon the telegraph company its extraordinary powers, and it gives a right of action to any one who is injured especially by it. Is not the sender or the addressee who suffers mental anguish from the breach a person thus specially injured, and should he not be allowed to recover?

As is well known, many courts have said "Yes," and more have said "No," and those which have said "Yes" have differed as to why they so said, and those which said "No" have differed as to why they so said. The battle of the jurisdictions on this question is far from a closed chapter of legal controversy. In many jurisdictions the question has not arisen yet, and in those where it has arisen and been decided, it is impossible to foretell how definitely it is settled.

We propose first to make a chronological table of the jurisdictions in which has arisen the question of the right of either the sender or the addressee of a message whose negligent delivery causes him no injury except mental anguish to recover compensation for that anguish. Then we shall consider the different theories upon which the cases proceeded.

1. Jurisdictions in which cases involving the Texas doctrine have arisen:—



Date.	Jurisdiction.	Decision.	Name.	Citation.
1875.	Indiana	Denied ( <i>dictum</i> )	W. U. T. Co. v. Hamilton	50 Ind. 181.
1877.	Illinois	Question not considered.	W. U. T. Co. v. Logan	84 Ill. 468.
1881.	Texas	Allowed.	So. Relle v. W. U. T. Co.	55 Tex. 308.
1884.	Dakota	Denied	Russell v. W. U. T. Co.	33 Dak. 315.
1888.	Kansas (1)	Denied	West v. W. U. T. Co.	39 Kan. 93.
1888.	Tennessee	Allowed	Wadsworth v. W. U. T. Co.	86 Tenn. 695.
1889.	U. S. C. C. (Texas)	Allowed ( <i>dictum</i> )	Beasley v. W. U. T. Co.	39 Fed. 182.
1889.	Missouri	Denied ( <i>dictum</i> )	Burnett v. W. U. T. Co.	123 Mo. App. 599.
1890.	Missouri	Allowed (overruling Hamilton case, <i>supra</i> )	Reese v. W. U. T. Co.	123 Ind. 264.
1890.	Alabama	Allowed	W. U. T. Co. v. Henderson	89 Ala. 510.
1890.	Kentucky	Allowed	Chapman v. W. U. T. Co.	90 Ky. 265.
1890.	North Carolina	Allowed	Young v. W. U. T. Co.	107 N. C. 370.
1890.	U. S. C. C. (Ga.) (2)	Allowed	Chase v. W. U. T. Co.	44 Fed. 554.
1891.	Mississippi (3)	Denied	W. U. T. Co. v. Rogers	68 Miss. 748.
1891.	U. S. C. C. (Ark.)	Denied	Cravson v. W. U. T. Co.	47 Fed. 544.
1891.	U. S. C. C. (Miss.)	Denied	Cahn v. W. U. T. Co.	48 Fed. 810.
1892.	Georgia	Denied	Chapman v. W. U. T. Co.	88 Ga. 763.
1893.	U. S. C. C. (Va.)	Denied	Tyler v. W. U. T. Co.	54 Fed. 634.
1893.	U. S. C. C. (Ohio)	Denied	Kester v. W. U. T. Co.	55 Fed. 603.
1893.	Missouri	Denied	Connell v. W. U. T. Co.	108 Mo. 459.
1893.	C. C. A. (Texas)	Denied (not noticing Beasley case, <i>supra</i> )	W. U. T. Co. v. Wood	57 Fed. 471.
1893.	Florida	Denied	International Ocean Tel. Co. v. Saunders	92 Fla. 434.
1894.	U. S. C. C. (Minn.)	Denied	Gahan v. W. U. T. Co.	59 Fed. 433.
1894.	Wisconsin	Denied	Summerfield v. W. U. T. Co.	87 Wis. 1.
1894.	Minnesota	Denied	Francis v. W. U. T. Co.	58 Minn. 252.
1894.	Oklahoma	Denied	Burner v. W. U. T. Co.	2 Okla. 234.
1895.	Iowa	Allowed	Mentzer v. W. U. T. Co.	93 Iowa. 752.
1895.	Ohio	Denied	Morton v. W. U. T. Co.	53 Ohio State. 431.
1897.	New York	Denied	Cornin v. W. U. T. Co.	13 App. Div. 233.
1897.	Illinois	Denied	W. U. T. Co. v. Halton	71 Ill. App. 63.
1898.	Kansas	Denied	Pay v. W. U. T. Co.	61 Ark. 338.
1898.	Pennsylvania (4)	Not decided	Rehinger v. W. U. T. Co.	20 County 630.
1899.	West Virginia	Denied ( <i>dictum</i> )	Davis v. W. U. T. Co.	46 W. Va. 48.
1900.	South Carolina (5)	Denied	Lewis v. W. U. T. Co.	37 S. C. 325.
1901.	U. S. C. C. (Cal.)	Denied	Stansel v. W. U. T. Co.	107 Fed. 668.
1901.	Indiana	Denied	W. U. T. Co. v. Ferguson	157 Ind. 64.
1902.	Virginia	Denied	Connely v. W. U. T. Co.	4 Va. Sup. Ct. 6.
1903.	Pennsylvania	Denied	Thomas v. W. U. T. Co.	80 Pitts. Leg. Journal 211.
1903.	Indian Territory (6)	Denied	.....	.....
1903.	Louisiana (7)	Allowed	Graham v. W. U. T. Co.	84 S. 91.

(1) But when a hard case arose this court, strong adherent though it be of the Northern rule, really allowed recovery for mental anguish, calling the damages, however, exemplary. W. U. T. Co. v. Lawson, 72 Pac. 283, Kans. 1903.

(2) Accord: Giddens v. W. U. T. Co., 111 Ga. 824, 1900.

(3) Mississippi has not been very enthusiastic in following the Rogers case. Magouirk v. W. U. T. Co., 79 Miss. 632, 1902: and the sendee of a message, the late delivery of which caused her only mental anguish, was held to have sufficient cause of action to entitle her to exemplary damages. W. U. T. Co. v. Watson, 33 S. 76, Miss. 1902; Hartzog v. W. U. T. Co., 34 S. 361, Miss. 1903.

(4) Although the court said explicitly that it would not consider the question of awarding damages for mental anguish, yet it would seem that by its mere act of dismissing the statement it decided in favor of the Northern doctrine. The ground stated for the dismissal was that there was no allegation of special damages, and that mental anguish was special damage. The So Relle case had held an almost identical complaint good, on the ground that mental anguish was general damage, and did not have to be alleged.

(5) In Butler v. W. U. T. Co., 62 S. C. 222, 1901, the beneficiary of the message, neither sender nor sendee, was held to have a cause of action for nominal damages upon which to base a recovery of punitive damages for the negligent delivery of a death message.

(6) It seems to have been admitted in W. U. T. Co. v. Cooper, 69 S. W. 427, Tex. 1902, and in W. U. T. Co. v. Waller, 74 S. W. 751, Tex. 1903, though it was only *dictum*, that mental anguish was not an element of damage in Indian Territory. We have been unable to find other authority on the subject.

(7) Based on the provision of the civil code allowing recovery for the deprivation of a "legal gratification." See page 121.

2. Jurisdictions where negligent delivery of message has caused physical, as well as mental, anguish:—

Date.	Jurisdic- tion.	Decision.	Name.	Citation.
1889.	Utah.....	Allowed...	Brown v. W. U. T. Co....	6 Utah, 219.
1894..	Michigan ....	Allowed...	Birkett v. W. U. T. Co....	103 Mich. 361.
1899...	Arkansas ....	Allowed	McCall v. W. U. T. Co....	58 Pac. 797, noted 9 Kans. App. 1886.
1902...	Nebraska ....	Allowed...	W. U. T. Co. v. Church...	90 N. W. 878.

The two sensations in this branch of the law were the overruling by the Ferguson case of the Reese case, and the consequent swinging of Indiana into the ranks of the supporters of the Northern rule, after an almost ten years' service under the Texas doctrine; and the passage by South Carolina, no doubt as a consequence of the Lewis case, of a law forcing that state into the columns of the Texas allies. A somewhat similar statute had been passed in Virginia in 1900,<sup>140</sup> but the Connelly decision, clearly in contravention of the legislative intent, held that statute not to allow recovery for mental anguish where that was the only consequence of the company's negligence. It is not likely, however, that a similar fate will befall the South Carolina act, which provides that "all telegraph companies doing business in this state shall be liable in damages for mental anguish or suffering, even in the absence of bodily injury, for negligence in receiving, transmitting or delivering messages."<sup>141</sup> The act shows by its very crudity—it fails to say to whom the company shall be liable, speaks of mental anguish without *bodily* injury, and not of mental anguish without *pecuniary* injury, and treats of negligence in *receiving* messages—the intensity of feeling which prompted its passage.

This is the actual state of the law to-day: Nineteen states and the federal courts have rejected the Texas rule; seven states (including the civil law State of Louisiana) have adopted it, and the legislature of one state, whose courts followed the majority, has declared for the Texas rule. Since 1895, not a single court governed by the rules of the common law has had the courage to join the minority, and yet it is remarkable with what unanimity the text-

<sup>140</sup> Acts of 1900, 724.

<sup>141</sup> Acts of 1901, 748, Sec. 1.

writers have advocated such a course.<sup>142</sup> And there is one consideration which, we feel, it is only fair to bear in mind in looking at the question of the numerical superiority of the one line of cases over the other. There is scarcely a more highly centralized industry in this country than our telegraph system—a glance at the cases in which the mental anguish question has arisen shows that in every one, except that in Florida, the Western Union Telegraph Company was the defendant. We suggest, without the slightest spirit of prejudice, that the immense advantage which the services of an experienced legal department, familiar with the entire body of electric law, necessarily affords, has been a not inappreciable factor in bringing about the present state of the decisions.

The facts in all of these mental anguish cases vary so little that any effort to distinguish them is useless.

The courts have not made any such effort, but have taken their stand unequivocally and emphatically, either for or against the Texas doctrine. It only remains to consider the different theories upon which the decisions have been based, for the reasoning, even in cases which reach the same decision, is far from uniform, and to determine which satisfy us best.

*Texas*.—It may be asserted with some degree of assurance that the *So Relle* case,<sup>143</sup> although very generally cited as the best exponent of the Texas doctrine, does not represent the present theory of the law in Texas.<sup>144</sup> That case, although this is not altogether clear, seems to go on the principle that the infliction of mental anguish, at least if willful, constituted not only an element of damages, but a cause of action. It was followed by the *Levy* cases,<sup>145</sup> which are even less clear. The sendee of the telegram,

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<sup>142</sup> Ecke, in 44 Cent. Law J. 176, 1897; Joyce, Elec. Law, Sec. 830, 1900; Watson, Personal Injuries, Sec. 450, 1901; Voorhies, Personal Injuries, Sec. 116, 1903; Clifton, in 57 Cent. Law J. 44, 1903. See the slighting reference to the support by the text-writers of the Texas rule, per Mitchell, J., in *Francis v. W. U. T. Co.*, 58 Minn. 252, 263, 264, 1894.

<sup>143</sup> *So Relle v. W. U. T. Co.*, 55 Tex. 308, 1881.

<sup>144</sup> See *W. U. T. Co. v. Stuart*, 66 Tex. 580, 1886.

<sup>145</sup> *Gulf S. Ry. v. Isaac Levy*, 59 Tex. 563, 1883; *Gulf S. Ry. v. J. T. Levy*, 59 Tex. 542, 1883.

Isaac Levy, was denied a recovery because the infliction of mental anguish was not a cause of action, and even if it were admissible as an element of damages, a sendee had no cause of action upon which a claim for damages could be predicated—he had no cause of action *ex contractu*, because the sender made the contract for his own benefit, and he had none *ex delicto*, because “no deprivation of any absolute right of the person has been stated which would entitle the appellee at least to nominal damages.” The sender of the message, J. S. Levy, on the other hand, was permitted to recover apparently on the ground that he had a cause of action, and although this was *ex contractu*, still, the code having abolished the distinction between actions *ex contractu* and those *ex delicto*, damages could be recovered as though the cause of action were of the latter kind;<sup>146</sup> but the court did seem to think that the sender had a right *ex delicto*, too, this right growing out of the public nature of the telegraph company’s duty. If there be such a right, one cannot but think that the court was inconsistent in not holding it to give the sender also a right *ex delicto*. This position was perhaps not very intelligible, but it settled two things—that the infliction of mental anguish was never a cause of action, but that, if a cause of action were established, it was an element of damages; and that the cause of action, whether exclusively *ex contractu* or not, could arise only in favor of those who

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<sup>146</sup> The effect of the Code on the question of damages has been considered in several of the telegraph cases, and such important decisions as *Wadsworth v. W. U. T. Co.*, 86 Tenn. 695, 1888, have been considered of little applicability in jurisdictions where there is no code: *Chapman v. W. U. T. Co.*, 88 Ga. 763, 1892; *Connelly v. W. U. T. Co.*, 4 Va. Sup. 6, 1902. Decisions in the code states undoubtedly do contain *dicta* to the effect that the Code has assimilated the measure of damages in contract with that in tort: See, *e. g.*, *United States Trust Co. v. O'Brien*, 143 N. Y. 284, 1894; but when we remember the fundamental truth that the Code was intended in no way to alter the substantive law, it becomes reasonably clear that these *dicta* were uttered in temporary forgetfulness of the fact that the law of damages is part of the substantive law, and that by the law of damages, the measures of relief in tort and in contract are different. When the question flatly arises, the old distinction is preserved; in tort, the liability is for natural results, whether contemplated or not: *Coy v. Gas Co.*, 146 Ind. 655, 1897; in contract, the rule of *Hadley v. Baxendale* limits the liability to results which should have been contemplated: *Wetherbee v. Meyer*, 155 N. Y. 446, 1898.

stood in a contractual relation with the company. The Stuart case,<sup>147</sup> which followed the Levy cases, is probably the best-considered case on the subject in Texas, and is regarded there as the leading case. Again there is laid down firmly the rule that mental anguish is not, standing alone, a cause of action, but that it is an element of damages where the chasm between wrong and remedy has been bridged over by a cause of action. Again we have a statement of the effect of the code in obliterating the distinction between the measure of damages in tort and in contract, but there is, perhaps more clearly indicated than in the previous cases, the thought that the sendee of a telegram can have no cause of action except in contract.

The *ratio decidendi* of the Stuart case has been adopted with great uniformity in Texas, but one cannot but feel that the results to which it has led are scarcely sustainable on strict legal principles. We have adverted already to what we believe to be a well-settled rule of the common law—that mental anguish is not a legal element of damages in actions *ex contractu*.<sup>148</sup> The Stuart case necessarily involves a denial of that principle, or, as expressed in the latter cases, an exception thereto.<sup>149</sup> We have also stated the rule as to the right of the beneficiary of a contract to sue in actions other than those against telegraph companies, and shown how, in the latter class of cases, an entirely different rule is adopted.<sup>150</sup> We propose now to consider to what extent the beneficiary's right has been carried in the telegraph cases. We shall not be surprised, when we recognize the eagerness of the Texan tribunals to allow the plaintiff to recover, and when we remember that the sendee could so recover only if he were the party for whose benefit the message was sent, that Gray's prophecy should have been proven erroneous. He had said, "The right of a third person to sue as beneficiary will be

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<sup>147</sup> In *W. U. T. Co. v. Sweetman*, 19 Civ. App. 435, 1898, however, there are *dicta* to the effect that mental anguish is not merely an element of damage, but also a cause of action. Perhaps the most accurate statement of the Texas rule is that in *W. U. T. Co. v. Simpson*, 73 Tex. 422, per Acker, P. J.: "Mental anguish may constitute an *element* of actual damage for which compensation may be recovered upon *breach of contract*." (Italics ours.)

<sup>148</sup> *W. U. T. Co. v. Arnold*, 73 S. W. 1083, Tex. 1903.

<sup>149</sup> Page 59.  
<sup>150</sup> Page 7.

limited to the comparatively small class of cases in which the person who employs the telegraph company to communicate the message does so solely to benefit the person to whom the message is directed."<sup>151</sup> Let us examine, in the light of that statement, a few of the Texas cases in which the plaintiff has been allowed to recover as the party "to be in fact accommodated, benefited or servd."<sup>152</sup>

We can understand readily that when the sender's wife and child died, and the sender sent to his father this message:—

"Bettie and baby dead. Come to Cleburne to-night train to my help"—

the court should say, "Whatever contract was made by the son was made for the benefit of himself, with no intent that it should inure in any respect to the benefit of the appellee (the sendee);"<sup>153</sup> the effect of the late delivery being, as the son alleged, that "he was compelled to put away the body of said wife among strangers and to bear his heavy affliction alone, without the comfort and consolation of any relative or friend."<sup>154</sup> But we are a little surprised to find that in the very next case, when the sender's brother was very ill, and the sender sent to his sister this message:—

"Clara, come quick, Rufe is dying"—

the court should have had no difficulty in finding that the contract was made for the benefit of the *sendee*.<sup>155</sup> And when this message was held to be for the benefit of the *sender*:—

"Come at once. Mr. Potts is not expected to live"—and this for the benefit of the *sendee*:—

"Mr. Lampkin is worse. Come down at once"<sup>157</sup>—

the drift of the decisions became evident, that the court would hold the contract to have been made for the benefit of whichever party to the message happened to sue first.

<sup>151</sup> Gray, Communication by Telegraph, Sec. 67.

<sup>152</sup> *W. U. T. Co. v. Adams*, 75 Tex. 531, at 536, 1889.

<sup>153</sup> *Gulf & Ky. v. Isaac Levy*, 59 Tex. 563, 566, 1883.

<sup>154</sup> *Gulf & Ky. v. J. T. Levy*, 59 Tex. 542, 545, 1883.

<sup>155</sup> *Adams v. W. U. T. Co.*, 75 Tex. 531, 1889.

<sup>156</sup> *Potts v. W. U. T. Co.*, 82 Tex. 545, 1891.

<sup>157</sup> *W. U. T. Co. v. Jobe*, 6 Civ. App. 403, 1894.

This was admitted practically the year after the Jobe case. The jury found that the message:—

“Come at once. Allen is very low”—

was sent for the benefit of both sender and sendee; and the sendee was allowed, nevertheless, to recover as the party for whose benefit the contract was made.<sup>158</sup> The logical conclusion would seem to be, that both the sender and the addressee of a social message should be allowed to sue *ex contractu* for a failure of the company promptly and accurately to deliver it. An opposite conclusion was reached in the Levy cases, but they arose before the laxity of the Texas rule became so great; in the present state of the law, it seems doubtful whether those cases would be followed upon the question of the party benefited. Since 1894, we have not found, throughout the Texas reports, a single case in which recovery has been denied on the ground that the plaintiff, whether sender or addressee, was not the person for whose benefit the contract was made.<sup>159</sup>

We cannot but feel that the illegal shifts to which the Texas rule has driven the courts of that state to resort prove the inherent vice of any theory which makes the right of recovery for mental anguish depend upon the establishment of a cause of action *ex contractu*, even if it be admitted that mental anguish can be considered an element of damage in contractual actions at all.

Accordingly, it does not seem strange that of those states which have adopted the Texas doctrine, few have based their decisions on the reasoning of the Texas courts, although in no case has there been a conscious recognition that the Texas interpretation of the Texas rule was being departed from.

*Tennessee*.—*Wadsworth v. W. U. T. Co.*<sup>160</sup> starts out and attacks the problem in a most satisfactory way. The sendee was suing for the mental anguish consequent on the late delivery of two messages announcing the dying

<sup>158</sup> *W. U. T. Co. v. Hale*, 11 Civ. App. 79, 1895. See also *W. U. T. Co. v. Clark*, 14 Civ. App. 563, 1896.

<sup>159</sup> Recovery was denied for that reason in *W. U. T. Co. v. Wood*, 57 Fed. 471, 1893; *W. U. T. Co. v. Henry*, 87 Tex. 165, 1894.

<sup>160</sup> 86 Tenn. 695, 1888, at 698.

condition and then the death of her brother. "The messages in question were couched in decent language, and were lawful in their purpose. Such being true, Walden had a legal right to send them, and Mrs. Wadsworth had a legal right to receive them; and it was the plain duty of the defendant to deliver them promptly. Its dereliction of duty and violation of her legal right unquestionably gave her a right of action;" and (later, on the opinion) "plaintiff having a clear right of action for some damage, as we have already seen, may maintain her action, and recover all the damage she may show herself to have sustained by reason of the wrongful act of the defendant; and in ascertaining the amount thereof, all proven elements of damage, admissible in either form of action (tort or contract), are for the consideration of the jury." There are two elements in the case upon which the court relied, and which other courts have relied on as distinguishing the Wadsworth case from the cases before them. First, as in the Texas cases, there is the Code, which the court appeared to consider, by the fusion of all forms of action into the single civil action, had extinguished the before-existing difference in the measure of damages in tort and in contract. There was no refusal to admit that such a difference had existed; the court pointed it out distinctly. Of this attitude one can only say that it proceeds on an exaggerated idea of the objects which the Code was intended to accomplish.<sup>161</sup> A difference in the measure of damages is undoubtedly a condition of the substantive law, and can with no propriety be considered as within the purview of a law obliterating procedural distinctions. Second, there was a statute requiring the transmission of all messages "correctly and without unreasonable delay." The part which this statute played in the reasoning of the court was that of imposing upon the telegraph company a general duty of prompt delivery, breach of which would constitute a cause of action. If it be true that this general duty would exist even in the absence of statute, the case would

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<sup>161</sup> In *Mach. Co. v. Compress Co.*, 105 Tenn. 187, 1900, the court applied the rule of *Hadley v. Baxendale*, in an action for breach of contract, just as it would have done in the absence of any code.



stand for the proposition that the failure of a telegraph company punctually and properly to deliver messages is the breach of a general duty, and hence a cause of action, in suit on which, mental anguish approximately resulting from it is an element of damage. When we consider the consequence of denying the existence of this general duty, the conclusion that it does exist seems almost inevitable. If the company be under no general duty to deliver messages which do not concern commercial transactions, the company, out of mere heartless malice, may destroy the message as soon as it has received it under promise to transmit, and be in no way liable to the addressee for the misery and affliction which its conduct may have caused him; for, it is conceived, the mere maliciousness of the company's action could not be said to constitute a breach of any duty owed to the addressee where, *ex hypothesi*, no duty is owed to him. The only alternative is, as we have tried to show, that the public nature of a telegraph company's employment does impose upon it a general duty to do carefully the work for which its property is dedicated to the use of the public. If this be so, the Wadsworth case does stand for the proposition that the failure promptly and accurately to deliver messages is a tort, and that, in recovering therefor, mental anguish is an element of damage.

This seems to be the view of the court in the only one of the later Tennessee cases<sup>102</sup> which throws much light upon the question: *W. U. T. Co. v. Frith*,<sup>103</sup> where the court, per Folkes, J., without referring either to the code or to the statute, says: "Telegraph companies, like common carriers, are public servants, and held to a very high degree of diligence and a strict discharge of duty. . . . Having violated its duty, and been negligent in its discharge, the company is liable in damages. These damages must be such as reasonably to compensate the party injured, not

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<sup>102</sup> *R. R. v. Griffin*, 92 Tenn. 694, 1893; *W. U. T. Co. v. Mellon*, 96 Tenn. 66, 1896 (absence of contractual relation between plaintiff and company held immaterial); *W. U. T. Co. v. Robinson*, 97 Tenn. 638, 1896; *Jones v. W. U. T. Co.*, 101 Tenn. 442, 1898; *Gray v. W. U. T. Co.*, 64 S. W. 1063, 1901.

<sup>103</sup> 105 Tenn. 167, 1900, at 171.

only for his pecuniary loss, but also for the mental anguish, grief and disappointment caused by the negligence." That, we believe, is as logical as it is satisfactory.

*Alabama.*—The Alabama courts have proceeded on a less definite theory than have any of the other courts adherents of the Texas rule. When recovery was first allowed for mental anguish, the distinction between the Texas interpretation of the rule and the Tennessee interpretation seems to have been recognized in a dim sort of way. The possibility of a cause of action *ex delicto* apparently was not recognized—at any rate, without a very close analysis of the problem, the court accepted the Texas view, deciding that where there was a cause of action *ex contractu*, mental anguish was admissible as an element of damages.<sup>164</sup> The converse of the rule was laid down, too—that if there were no contractual relation between the plaintiff and the sender, no action could be maintained.<sup>165</sup>

The latest cases, however, involve in considerable doubt the exact position of the Alabama courts. The right of the addressee might have been developed according to the Texas view; but, more, we imagine, from the unfavorable attitude of the Alabama courts to the entire class of actions,<sup>166</sup> than from any realization of the unsatisfactory looseness of that view, there was no such development. On the other hand, it seems to have been felt that the company's liability was not exclusively contractual: "Independent of the promise by the defendant to deliver the message when it accepted it for transmission, the law imposes the duty upon it of transmitting and delivering it with all reasonable diligence."<sup>167</sup> Logically, it would seem that on such a theory a basis of recovery was established in every case. To defeat this undesired result, the courts have fallen into the habit of requiring a strictness in pleading at which even Baron Parke might have halted. In

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<sup>164</sup> *W. U. T. Co. v. Henderson*, 89 Ala. 510, 1890.

<sup>165</sup> *W. U. T. Co. v. Wilson*, 93 Ala. 32, 1881; *W. U. T. Co. v. Cunningham*, 99 Ala. 314, 1893. In this latter case punitive damages were allowed, although the action was *ex contractu*.

<sup>166</sup> *W. U. T. Co. v. Ayers*, 131 Ala. 391, 1901.

<sup>167</sup> *W. U. T. Co. v. Krichbaum*, 31 S. 607, 1902.

*Blount v. W. U. T. Co.*,<sup>168</sup> the complaint of a sendee was dismissed on the ground that the only injury alleged was the mental anguish itself. According to the general form of pleading under the Code, all the facts were set out, and since the court conceded that the action would have been sustainable had a cause of action been found, either *ex contractu* or *ex delicto*, the dismissal of the complaint certainly seems to have been based on a very small technicality.<sup>169</sup> In the Krichbaum case, the complaint set up a contractual relation between the sendee and the company, and alleged also a breach of duty. The court held that since the gravamen of the action was the breach of a duty which existed independently of any contract, the averment of the existence of a contract was fatal to the right of recovery.<sup>170</sup> If this be the effect of the Code, we must needs mourn the disappearance of those ancient pleaders so skilled in the intricacies of the common law.

The result of the Alabama cases seems to be that, as in Tennessee, a cause of action exists *ex delicto*, and even one who stands in no contractual relation to the company can recover for mental anguish, if he can frame a complaint which will meet the technical requirements of the Code as construed in Alabama.<sup>171</sup>

*Indiana.*—The Indiana courts have wavered more than those of any jurisdiction which we shall have to consider. The first time that the question of recovery for mental anguish was presented to them, the *obiter dictum* was hostile to allowing the recovery;<sup>172</sup> but when a decision on the subject was necessary, an opposite result was arrived at, and the recovery was allowed.<sup>173</sup> As in all the cases which we have considered thus far, the mental anguish was considered not a cause of action, but an element of damages.

<sup>168</sup> 126 Ala. 105, 1900.

<sup>169</sup> *Contra, Milliken v. W. U. T. Co.*, 110 N. Y. 403, 1888.

<sup>170</sup> See also *P. T. C. Co. v. Ford*, 117 Ala. 672, 1898; *S. C. 124 Ala. 400*, 1900.

<sup>171</sup> The natural apprehension that mental anguish would not be considered an element of damage in any case, in view of the attitude of the Alabama courts, is dispelled by the *W. U. T. Co. v. Crocker*, 33 S. 45, 1902, where the sender recovered for mental anguish.

<sup>172</sup> *W. U. T. Co. v. Hamilton*, 50 Ind. 181, 1875.

<sup>173</sup> *Reese v. W. U. T. Co.*, 123 Ind. 294, 1890.

In the Reese case, the plaintiff was the sender, who, of course, had a right of action *ex contractu*. But the court says, per Berkshire, J., "In failing to promptly deliver the telegram, the telegraph company negligently fails to perform a duty which it owes to the sender of the telegram, and should be held liable for whatever injury follows as the proximate result of its negligent conduct. It is not a mere breach of contract, but a failure to perform a duty which rests upon it as a servant of the people."<sup>174</sup> This statement admits of two interpretations and both have been given to it. It might be considered as a repetition of the Tennessee view, that failure to use due care in the delivery of messages is, in every case, the breach of a public duty.<sup>175</sup> But it may be considered also as standing for a view which is more clearly brought out in a later case, where the basis of the rule allowing recovery for mental anguish is asserted to be, that "the language of a message gives direct notice to the telegraph company that the message concerns such event or events as that negligence on the part of the company is likely to be followed by mental distress. The telegraph company then has the measure of responsibility, and is held liable for special damages for negligence."<sup>176</sup> This thought is strikingly similar to that of Bigelow, discussed before.<sup>177</sup> It places the liability of the company, not on any ground of public duty, but on a basis of negligence, *i. e.*, failure to use reasonable care to avoid the affliction upon another of legal injury. The only injury inflicted is mental anguish, and if, as even the Indiana cases admit, the infliction of mental anguish be not a cause of action, it is not a legal injury, and there is no legal duty to use reasonable care to avoid its infliction upon another.

Indiana had not taken very eagerly to the Texas doctrine—even in the appellate courts there had been murmurings against its propriety,<sup>178</sup> and the first time that the

<sup>174</sup> At 303.

<sup>175</sup> *W. U. T. Co. v. Stratemeier*, 6 Ind. App. 125, 1892; *W. U. T. Co. v. Todd*, 1899, 53 N. E. 194.

<sup>176</sup> Per Comstock, C. J., *W. U. T. Co. v. Bryant*, 17 Ind. App. 70, at 74, 1897.

<sup>177</sup> Pages 16 to 22.

<sup>178</sup> *W. U. T. Co. v. Briscoe*, 18 Ind. App. 22, 1897.

supreme court had a chance to consider the Reese case, the Reese case was overruled with but a weak dissent, and the old rule of twenty-six years before reverted to.<sup>179</sup> The Ferguson case evidently was carefully considered, and coming, as it does, from a jurisdiction supposed to be committed irretrievably to the Texas doctrine, it probably will become the leading exponent of the Northern rule. With considerable diffidence, we suggest, however, that the arguments in favor of the Texas rule, which the court in the Ferguson case answered, were not the arguments which the best-considered advocates of that rule advanced. The court first asserts that a recovery for mental anguish was unknown at common law, concluding an examination of cases of physical injuries, of seduction, libel, etc., with the assertion, "These classes in which mental anguish is cognizable as incident to a cause of action, complete without it, at least negatively indicate the common law rule that mental anguish as the proximate and sole result of a negligent act does not constitute a cause of action." The court assumes, without discussion, that the addressee of a message has no cause of action independently of the mental anguish which he suffers.<sup>180</sup> As we have shown, it is on this point that argument was necessary—even the supporters of the Texas rule do not claim that mental anguish standing alone constitutes a cause of action. We scarcely can doubt but that the right of recovery for mental anguish in Indiana is settled definitively in the negative,<sup>181</sup> but leaving aside for later consideration the argument *ab inconvenienti*, there is no reason on the theory of the Ferguson case why the sender at least, who certainly has a cause of action by statute, independently of the mental anguish suffered, should not recover for that mental anguish as an element of damages. In brief, we submit that the Ferguson case is no answer at all, at least as to strictly

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<sup>179</sup> *W. U. T. Co. v. Ferguson*, 157 Ind. 64, 1901.

<sup>180</sup> The same *petitio principis* was made in *Connelly v. W. U. T. Co.*, 4 Va. Sup. 6, 1902. Indeed, the only case supporting the Northern rule which really attacks, and with great cleverness, the true basis of the Texas rule is *Chapman v. W. U. T. Co.*, 88 Ga. 763, 1892.

<sup>181</sup> The Ferguson case was followed in *W. U. T. Co. v. Adams*, 63 N. E. 125, 1902.

legal considerations, to the Texas rule, if the Texas rule be taken to establish, not that mental anguish is a cause of action, but that, a cause of action being established, mental anguish is an element of damages.

*Kentucky.*—The Kentucky courts have adopted the Texas view of the Texas rule—that mental anguish is an element of damage where a cause of action is established; but that a cause of action can only be *ex contractu*. “If a telegraph company undertakes to send a message, and it fails to use ordinary diligence in doing so, it is certainly liable for some damage, though it may be nominal only. It has violated its contract, and whenever a party does so, he is liable at least to some extent. Every infraction of a legal right causes injury in contemplation of law. The party being entitled in such a case to recover something, why should not injury to the feelings, which is often more injurious than a physical one, enter into the estimate?”<sup>182</sup> Most of the later cases follow the Chapman case without much discussion,<sup>183</sup> but a very recent one, although recovery is refused there because of the remoteness of the damage, shows that the theory in that state still is that mental anguish is an element of damage only when a cause of action exists *ex contractu*.<sup>184</sup> There has been much less litigation of the question in Kentucky than in Texas, and there are no cases in the former state which have extended the doctrine of the beneficiary’s right to sue, as has been done in Texas. Should the courts of Kentucky, however, regard the action with as much favor as do those of Texas, we cannot but feel that an adherence to the necessity of finding a contractual cause of action will lead, sooner or later, to conclusions not tenable on strict legal principles.

*North Carolina.*—The early North Carolina cases, like some of the Indiana cases, based the right of recovery on

<sup>182</sup> Per Holt, J., *Chapman v. W. U. T. Co.*, 90 Ky. 265, at 270, 1890.

<sup>183</sup> *Davis v. W. U. T. Co.*, 21 Ky. Law R. 1251, 1900; *W. U. T. Co. v. Fisher*, 21 Ky. Law R. 1293, 1900; *Taliaferro v. W. U. T. Co.*, 21 Ky. Law R. 1290, 1900; *W. U. T. Co. v. Van Cleave*, 22 Ky. Law R. 53, 1900; *W. U. T. Co. v. Matthews*, 24 Ky. Law R. 3, 1902; *W. U. T. Co. v. Herning*, 24 Ky. Law R. 1433, 1903.

<sup>184</sup> *Robinson v. W. U. T. Co.*, 24 Ky. Law R. 452, 1902.

principles of negligence;<sup>185</sup> a theory which seems to us inadequate in the mental anguish cases. But the later expressions conform more to the Tennessee view, that carelessness is a breach of the duty which the public nature of the telegraph company's employment imposes on it. "A quasi public corporation exercising extraordinary powers and receiving enormous profits, solely in consideration of the performance of its public duties, cannot be permitted to neglect or evade those duties with practical impunity."<sup>186</sup> This, we submit, is a lofty and a proper view; when the telegraph company through negligence fails to deliver a message, it is injuring the entire public, and a recovery against the company for such negligence is an indirect benefit to the public, for it is an insistence on the responsibility of its servant. This is what is in the mind of the court when it says, in the case last cited, "This liability on the part of public servants to respond in civil damages to the injured party is the surest guarantee for the proper performance of their duties to the public."<sup>187</sup> The subsequent North Carolina cases are of little value, and the Cashion case stands as the strongest expression of that court.

*Iowa.*—Iowa is the last jurisdiction which has adopted the Texas rule,<sup>188</sup> and it, for one, cannot complain that allowing the recovery has proven to be the "Pandora Box" which it was predicted that it would be,<sup>189</sup> for the seven years which have passed since that box was opened in Iowa have failed, as far as we have been able to find, to produce a single mental anguish case to plague the courts. To our mind, the Mentzer case contains far the clearest and ablest opinion of all the well-considered opinions on the subject. Judge Deemer commences his argument by showing that

<sup>185</sup> *Young v. W. U. T. Co.*, 107 N. C. 370, 1890; *Sherrill v. W. U. T. Co.*, 116 N. C. 655, 1895.

<sup>186</sup> Per Douglas, J., in *Cashion v. W. U. T. Co.*, 123 N. C. 267, at 272, 1898.

<sup>187</sup> *Bennett v. W. U. T. Co.*, 128 N. C. 103, 1901; *Rosser v. W. U. T. Co.*, 130 N. C. 251, 1902; *Sparkman v. W. U. T. Co.*, 130 N. C. 447, 1902; *Meadows v. W. U. T. Co.*, 43 S. E. 512, N. C. 1903.

<sup>188</sup> *Mentzer v. W. U. T. Co.*, 93 Iowa, 752, 1895.

<sup>189</sup> Per Mitchell, J., in *Francis v. W. U. T. Co.*, 58 Minn. 252, 1894.

a telegraph company is a public agent; that its duty properly to fulfill its contract is entirely independent of the contractual obligation itself; and that a party injured by the company's neglect of its duty may sue either in tort or, in many cases, in contract. He then points out that the Code having abolished procedural differences between actions in contract and those in tort, a plaintiff should recover whatever damages could be had in either form of action. We cannot forbear to quote part of the beautifully clear-cut statement which follows, of the difference in the measure of damages in tort and in contract. After stating the rule in *Hadley v. Baxendale*, which governs the measure of damages in contract, the court proceeds: "In actions for tort, the rule is much broader. The universal and cardinal principle in such cases is that the person injured shall receive compensation commensurate with his loss or injury, and no more. . . . These damages are not limited or affected, so far as they are compensatory, by what was in fact contemplated by the party in fault. He who is responsible for a negligent act must answer for all the injurious results which flow therefrom by ordinary natural sequence, without the interposition of any other negligent act or overpowering force. Whether the injurious consequences may have been reasonably expected to follow from the commission of the act is not at all determinative of the liability of the person who committed the act to respond to the person suffering therefrom. As was said in *Stevens v. Dudley*, 56 Vt. 158, 'it is the unexpected, rather than the expected, that happens in a great majority of cases of negligence.'"<sup>190</sup>

Having established that the company's negligence creates a cause of action, either in contract or in tort, and second, that the mental anguish is both a reasonably to-be-expected consequence under *Hadley v. Baxendale*, and a natural and not too remote result under the test in tort, the court proceeds to the third inquiry—whether mental anguish is an admissible element of damages, either in contract or in tort. The conclusion reached is affirmative in both cases, and strongly as we may be convinced, before reading

<sup>190</sup> At 760.



the opinion, that mental anguish is not an element of damages in actions for breach of contract, we can keep ourselves from concurring in the court's opinion that it should be, only by holding fast to the knowledge that although, as has been said, "mental anguish antedated the beginnings of the common law,"<sup>191</sup> it never has been considered an element of damages in contractual actions by any of those great judges who planted and tended in its youth the great tree of our system of jurisprudence. But the court is not hampered in this way when it comes to the question of the admissibility of mental anguish as an element of damages in tort actions, and we must say that it seems to us, as it seemed to the Iowa court, that "when it is conceded that mental suffering may be compensated for in actions of tort, the right of the plaintiff to recover in this case is established."

The *ratio decidendi*, in brief, was this—omitting what was said as to the contractual nature of the action: First, the negligence of a telegraph company is the breach of a public duty, for which it is liable "to any person injured thereby for all the damages which he may sustain"; second, mental anguish resulting from negligence in the delivery of a death message is a natural and not too remote consequence of the breach of duty; third, mental anguish is a species of injury recoverable for, when the natural and proximate consequence of an existing cause of action in tort. This is putting the Texas rule on a much sounder basis than the Texas courts have put it, and represents perhaps the strongest possible argument in favor of the right of recovery for mental anguish.

Those jurisdictions which have adopted what we have called the Northern rule have been much more consistent in the reasoning upon which their decisions have been based than have been the supporters of the Texas rule. Their arguments have been that recovery for mental anguish is, from a legal standpoint, an innovation, and that it is, from a practical standpoint, an undesirable innovation. We have been considering the former position up to this point, and have endeavored to show that we are by no means

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<sup>191</sup> Per Baker, J., in *Ferguson v. W. U. T. Co.*, 157 Ind. 64, 65, 1901.

without precedent in regarding mental anguish as an element of damages at common law.

We propose now to consider the practical objections which have been made to the Texas rule. It has been suggested as an interesting speculation, whether all law did not come originally from public policy,<sup>192</sup> and when we remember that law is merely the expression of a community's sense of right, and that "right is nothing else but whatever reason certainly acknowledges as a sure and concise means of obtaining happiness,"<sup>193</sup> we cannot doubt but that the practical considerations, "to which the traditions of the bench would hardly have tolerated a reference fifty years ago,"<sup>194</sup> are entitled to great weight in the determination of this subject. One can sympathize thoroughly with Cauty, J., when he said, "Mere logic will not dispose of a question of this character. The court must keep one eye on the theoretical and the other on the practical."<sup>195</sup> If, however, we have been fortunate enough to establish the proposition that mental anguish is at common law an usual element of compensation in tort actions, it seems but fair that those who favor making an exception in the telegraph cases should assume the burden of showing the inadvisability of allowing recovery. The two practical objections which have been urged are, first, the impolicy of opening so immense a field of litigation, and second, the futility and consequent absurdity of attempting to measure, in money, injury which, from its very nature, is invisible, intangible, unascertainable.

When we consider statistics—and this we must do, to answer the uniformly made and, strangely enough, never disputed argument, that to allow recovery in these mental anguish cases would foster an "intolerable and interminable litigation, beyond the reach of ordinary imagina-

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<sup>192</sup> Bausman, 10 Wash. Bar Ass'n Rep. 143, 1898.

<sup>193</sup> Burlamaqui, Natural and Political Law (7th ed.), 37.

<sup>194</sup> Holmes, Common Law, 78.

<sup>195</sup> *Francis v. W. U. T. Co.*, 58 Minn. 252, at 267, 1897. "For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of economics and the master of statistics": Judge Holmes, *The Path of the Law*; a striking sentence from a striking lawyer. 10 Harv. Law Rev. 457, at 469, 1897.

tion"<sup>196</sup>—we cannot but feel how much more fearful than fact is fancy. We cannot wonder that court after court has rejected the Texas rule, when it reads and believes such statements as this: "If suits at law for damages were permitted for mental suffering only, all the courts of the Union would speedily find themselves in the plight of the Texas tribunals, wherein a large percentage of the total litigation consists of actions against telegraph companies for negligence in delivering dispatches, the only alleged damage being subjective and very frequently entirely imaginary."<sup>197</sup> With this assertion in mind, it is interesting to see how large a percentage of the cases in Texas reported in the official series of reports of that state during 1899 and 1900 were mental anguish cases. In the supreme court, out of the one hundred and ten cases which came up in 1899, not a single one involved the question which we have been considering, and out of the one hundred and twenty which arose in 1900, a solitary one represented this litigious branch of Texas jurisprudence. In the courts of civil appeals, the four hundred cases contained four decisions on the recovery for mental anguish in 1899, and the same number in 1900. *Of ten hundred and thirty cases, just nine mental anguish cases*—less than 1 per cent. In the face of such facts, one scarcely can hear without impatience the customary warning against the "intolerable litigation"<sup>198</sup> which is said necessarily to follow the adoption of the Texas rule.

The Ferguson case,<sup>199</sup> adopting the line of argument in the Rogers case,<sup>200</sup> has attempted to show that certain positions considered by the supporters of the Northern rule entirely inconsistent have been assumed by the Texas courts as the result of a wild effort to restrain the volume of litigation consequent on the adoption of the Texas rule. Some of the positions we believe to be not at all irreconcilable, and others, if undistinguishable in principle, are different in facts. Of the latter kind, the majority are

<sup>196</sup> Per Hughes, J., *Peay v. W. U. T. Co.*, 64 Ark. 538, at 545, 1898.

<sup>197</sup> N. Y. Law Journal, August, 1902.

<sup>198</sup> *Morton v. W. U. T. Co.*, 53 Ohio St. 431, 1895.

<sup>199</sup> 157 Ind. 64, 1901.

<sup>200</sup> 68 Miss. 748, 1891.

traceable, in our opinion, to the Texas view of the Texas rule, viz., that a cause of action *ex contractu* is necessary to maintain the action. Hence the decisions before commented on,<sup>201</sup> as to the party benefited by the contract; hence the decisions as to the presumption of mental anguish in case of blood relationship only;<sup>202</sup> hence the decisions as to what language does give notice to the company of the importance of the message and what does not. If the cause of action be *ex delicto*, and the test of reasonably foreseeable injury be replaced by that of naturally consequent injury, most at least of these apparent contradictions would vanish. Of those positions which we believe to be not irreconcilable, the most striking is the much-decried distinction in *Rowell v. W. U. T. Co.*,<sup>203</sup> "between the negligence of failing to deliver a dispatch which causes mental pain and suffering, and failing to deliver one which, if delivered, would *relieve* such suffering."<sup>204</sup> When a company fails to deliver a dispatch announcing, for instance, the death of the addressee's father, for what mental anguish does the addressee recover? Of course, not for the grief at the fact of his father's death—the telegraph company was not responsible for that,<sup>205</sup> nor for his disappointment at not receiving news of his father's death earlier—it might be questioned whether that, standing alone, would not be rather a relief. "The alleged actionable wrong is in depriving the plaintiff of the opportunity of attending the funeral,"<sup>206</sup> as is proven by the fact that there can be no recovery if the evidence show either that the plaintiff would not have gone to the funeral even if he had received the message,<sup>207</sup> or that he could not have reached the place

<sup>201</sup> Pages 83 to 85.

<sup>202</sup> *Cashion v. W. U. T. Co.*, 123 N. C. 267, 1898; *W. U. T. Co. v. Coffin*, 88 Tex. 94, 1895; *W. U. T. Co. v. Steenbergen*, 21 Ky. Law R. 1289, 1900.

<sup>203</sup> 75 Tex. 26, 1889.

<sup>204</sup> At 759.

<sup>205</sup> *So Relle v. W. U. T. Co.*, 55 Tex. 308, 1881; *Rosser v. W. U. T. Co.*, 130 N. C. 251, 1902.

<sup>206</sup> *W. U. T. Co. v. Ferguson*, 157 Ind. 64, 71, 1901; *W. U. T. Co. v. Simmons*, 75 S. W. 822, Tex. 1903.

<sup>207</sup> *W. U. T. Co. v. Johnson*, 16 Tex. Civ. App. 546, 1897; *W. U. T. Co. v. Steenbergen*, 21 Ky. Law R. 1289, 1900; *W. U. T. Co. v. Parsons*, 72 S. W. 800, Ky. 1903; *Bright v. W. U. T. Co.*, 43 S. E. 841, N. C. 1903.

of the funeral before it was over,<sup>208</sup> or that he failed to do so because of his own negligence.<sup>209</sup> In other words, what the addressee recovers for, is not his mental anguish at not receiving the intelligence contained in the message, but his mental anguish at being unable to do what the prompt receipt of that intelligence would have enabled him to do. In a case where the message in question is:—

“Sam is better”<sup>210</sup>—

it is evident that the only mental anguish suffered from the non-delivery of the message is the failure to receive the intelligence contained in it.<sup>211</sup> It may be said that the distinction is unsubstantial, and that recovery should be allowed even though the only mental anguish ensuing the company's negligence be from the non-receipt of the intelligence contained in the message. This, it must be admitted, is a reasonable contention, but we suggest that the rule has not been adopted in such breadth, for the reason hinted at above—that ignorance of a sad event might be considered by many people bliss. That is, the recovery is denied, not because of any inherent quality of the mental anguish, but because of the uncertainty of its existence; it is considered as, and excluded like, any other speculative or imaginary element of damage.<sup>212</sup>

We believe, then, that the fear of a great increase in the magnitude of litigation, as a consequence of the adoption of the Texas rule, is unfounded; but it does seem strange to us that the probability of this anticipated increase has never been regarded as an argument in favor of the Texas rule. In theory, at least, every time that a plaintiff recovers, his success is predicated of a previous status obnoxious to the law, and restores that equipoise of right and wrong

<sup>208</sup> *Cumberland Tel. Co. v. Brown*, 104 Tenn. 56, 1900.

<sup>209</sup> *W. U. T. Co. v. Bryson*, 61 S. W. 548, Tex. 1901; *W. U. T. Co. v. Sorsby*, 69 S. W. 122, Tex. 1902.

<sup>210</sup> *McCarthy v. W. U. T. Co.*, 56 S. W. 568, Tex. 1900.

<sup>211</sup> It is suggested in *W. U. T. Co. v. Cavin*, 70 S. W. 229, 1902, that recovery was denied in the Rowell case because the damage was *too remote*; but this position seems to us unsustainable.

<sup>212</sup> *McAllen v. W. U. T. Co.*, 70 Tex. 243, 1888; *Morrison v. W. U. T. Co.*, 24 Tex. Civ. App. 347, 1900. So, if it be shown that inability to attend a funeral caused a plaintiff relief, rather than pain, he could not recover at all: *W. U. T. Co. v. Simmons*, 75 S. W. 822, Tex. 1903.

which we call justice. When the law refuses to bring about this condition, there is created a state of affairs which we euphemistically term *damnum absque injuria*—i. e., true, an individual has been injured, but we cannot relieve him. To justify a stand apparently so unjustifiable, we believe that but one cause can be assigned, viz., that if this act of justice to the injured individual were performed, a disproportionately great injustice would be done to the community; the endurance of injustice is, under the circumstances, the price of the social status.<sup>213</sup> It is conceived that the legitimate operation of the principle *damnum absque injuria* is confined to four classes of cases: First, where it is equivalent to the maxim *de minimis non curat lex*—as where the court refuses to consider failure to award nominal damages reversible error, or where it sustains a demurrer to an action so trivial that the court considers the consideration of the action beneath its dignity;<sup>214</sup> second, where one of two persons possessing equal rights has attempted, by acting on his right before the other similarly exercised his, to prevent the latter from exercising his right to the same degree as *he* has done already—as where an owner of land builds upon it and demands that his neighbor furnish lateral support for his house, or where a man who has gone into one line of business wishes to enjoin another from competing with him; third, where the legislature has authorized the infliction of a certain injury by one on another, and the latter is without redress for this exercise of the right of the sovereign to take the property of its subject; and fourth, where, in the interests of the common safety, the injuring of one man's property is requisite. But except in these cases, we believe that every decision is to be approved which lessens this "imperfect coincidence between the sphere of things hurtful in fact and hurtful in law."<sup>215</sup> It is, *pro tanto*, a remedy for a legal disease theretofore believed incurable. It is a step towards what must be the ideal of any civilized system of law—that a remedy

<sup>213</sup> Of course, too, as member of the community, he is benefited at the same time.

<sup>214</sup> Story, Equity Pleadings, Sec. 500.

<sup>215</sup> Salmond, Jurisprudence, 160.

should be furnished for every wrong, using the latter term in its broadest sense.

None of the four exceptions above stated would bring within this *grotto del cane* of the common law the action for damages for mental anguish, and as far as the mere number of cases in which, under the Texas rule, a plaintiff would be relieved goes, we feel that the argument is in favor of the Texas rule. For, it must be remembered that "if the rule open a vast and fruitful field of litigation, it is only because telegraph companies fail to do their duty."<sup>216</sup> As a matter of fact, very little hardship is imposed on the telegraph companies by requiring them to deliver messages promptly and properly. Except under unusual circumstances, there is no reason why messages should not be transmitted with perfect accuracy, and even less why they should not be delivered with reasonable punctuality. We cannot but exclaim, when we read opinions in which the liability to error, by reason of the necessary infirmity of telegraph apparatus, is made the excuse for freeing the company of the duty to be careful, "Is it an infant yet in its swaddling clothes? No, but a giant power, under the control of man, whose daily exploits, guided by his care and skill, throw those of the fabled Mercury deep into shade."<sup>217</sup>

In short, we believe that even did the adoption of the Texas rule cause a much greater increase in the amount of litigation than it really does, no principle of public policy requires or justifies even its rejection on that ground alone.

A much stronger argument against the adoption of the rule is found in the nature of the injury itself; it "soars so exclusively within the realms of spirit land that it is beyond the reach of courts to deal with, or to compensate by any of the known standards of value,"<sup>218</sup> say those who reject the rule. It is, perhaps, not useless to notice at the outset two considerations which even aggravate this diffi-

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<sup>216</sup> *Mentzer v. W. U. T. Co.*, 93 Iowa, 752, at 771, 1895.

<sup>217</sup> Per Breese, J., in *W. U. T. Co. v. Tyler*, 74 Ill. 168, at 170, 1874; and see *Reed v. W. U. T. Co.*, 135 Mo. 661, 1896.

<sup>218</sup> Per Taylor, J., in *I. O. T. Co. v. Saunders*, 32 Fla. 434, 1893; and see Lurton, J., dissenting in *Wadsworth v. W. U. T. Co.*, 86 Tenn. 695, 1888; *Curtin v. W. U. T. Co.*, 13 App. Div. 253, N. Y. 1897; Hamilton, *Liability of Telegraph Companies*, 53 Cent. Law, J. 6, 1901.

culty of giving a just compensation: First, whenever a plaintiff has been wronged by a rich corporation, the danger that the jury will not remember that damages for mental anguish are purely compensatory,<sup>219</sup> and will inflict an unwarrantably high verdict as a punishment, is as great as it is irremediable.<sup>220</sup> The second consideration is one which handicaps the plaintiff. He sues—and we quote this editorial from our daily press as representing the general feeling—“More for the purpose of imposing a penalty upon the company for negligence than for the mere hope of having a financial reward and making money out of the calamity.”<sup>221</sup> Or, as a plaintiff less elegantly told the jury in a late Texas case, “I wanted to spite the company, and get every cent out of them I could. It was not because I cared for the money.”<sup>222</sup> It is easy to see that, as a practical matter, a man who admitted to the jury that he was suing to obtain a profit from his relative’s death would make a very small profit indeed. But the plaintiff in the Bell case was defeated by the court through the very language which was necessary to save him before the jury: “For anger and resentment toward defendant,” said the court, “there can be no recovery.” The recovery is, in theory, limited to compensation, to the quantity of coin equal to the mental anguish of the plaintiff. At first it seems absolutely impossible to think of the one in terms of the other; it was said eighty years ago, “there is no standard by which the price of affection can be adjusted, and no scale to graduate the feelings of the heart.”<sup>223</sup> But, undaunted by these apparently insurmountable obstacles, let us consider the problem a little further.

The first question which naturally suggests itself is, can we not fix an arbitrary limit to the amount of recovery?<sup>224</sup> Certainly such a limitation could come only from the legis-

<sup>219</sup> *Stuart v. W. U. T. Co.*, 66 Tex. 580, 1886; *I. O. T. Co. v. Saunders*, 32 Fla. 434, 1893; *Cashion v. W. U. T. Co.*, 123 N. C. 267, 1898.

<sup>220</sup> *W. U. T. Co. v. Womack*, 9 Tex. Civ. App. 607, 1895.

<sup>221</sup> *Utica Press*, August 6, 1902.

<sup>222</sup> *W. U. T. Co. v. Bell*, 61 S. W. 942, 1901.

<sup>223</sup> Per Taylor, C. J., in *Francis v. Howard*, 3 Murphy, 74, 80, N. C. 1819.

<sup>224</sup> Advocated by Cauty, J., in *Francis v. W. U. T. Co.*, 58 Minn. 252, at 267, 1894.



lature. In those states whose constitutions forbid any limitation for damages in personal actions for negligence,<sup>225</sup> such legislation would be impossible. In other states it would be possible if not otherwise unconstitutional. The question of its constitutionality would involve two considerations: First, could a legislature provide that mental anguish should be an element of damages only in telegraph cases, or would this be a taking of the telegraph company's property without due process of law; and second, if the statute be constitutional in allowing damages in such cases, can their amount be limited? The first question has been answered in the affirmative by the Supreme Court of South Carolina, upholding in a most able opinion the "mental anguish" act of 1901.<sup>226</sup> The second question seems scarcely doubtful in view of the numerous acts limiting liability for injuries caused by negligence, in states whose constitutions do not forbid such limitations.<sup>227</sup> There are, to our mind, very many arguments in favor of such a limitation, and we feel that the possibility of providing so adequate a remedy for the much-complained-of unascertainability of the amount of recovery should be a controlling consideration in those jurisdictions which have refused to adopt the Texas rule because the damages are "too vague, shadowy and uncertain."<sup>228</sup>

Personally, however, we do not believe that such a statute is necessary. The difficulty of estimating a money equivalent for anything diminishes as we exchange the article for the money. We sell horses often; and so, we have comparatively little difficulty in estimating the pecuniary value of a horse. We do not sell our feelings; and so, we have great difficulty in calculating their worth in currency; but moralizing aside, this difficulty is simply because we are not accustomed to think of feelings in terms of money. Of course, in the case of a horse, there is a common denominator between the money and

<sup>225</sup> Arkansas, Art. 5, Sec. 32; Kentucky, Art. 15, Sec. 54; Penna., Art. 3, Sec. 21; Wyoming, Art. 10, Sec. 4; New York, Art. 1, Sec. 18 (only as to injuries resulting in death).

<sup>226</sup> *Simmons v. W. U. T. Co.*, 63 S. C. 425, 1902.

<sup>227</sup> Collected in *Southern Law Rev.* N. S. 703.

<sup>228</sup> Per Mr. Justice Pope, in *Lewis v. W. U. T. Co.*, 57 S. C. 325, 1900.

the horse, viz., the average desire for each; whereas, in the case of mental anguish, the demand and the supply, so to speak, are centred in the same individual. It is necessary, then, to admit that a demonstrably exact money equivalent for mental anguish cannot be found.<sup>229</sup> But the law does not require that; what it wants is a sum of money which it is fair that the defendant should pay to the plaintiff.<sup>230</sup> In cases of personal injury, we are familiar with the expedient of resorting to a comparison of verdicts in similar cases, to determine the reasonableness of the verdict in a particular case. It may be objected that this is not scientific, but it cannot be said that, like the "stop, look and listen" rule, it does not tend to reduce to a convenient certainty that which before was most inconveniently uncertain. In a late Missouri case, the court arrived at what it considered a reasonable verdict by tabulating verdicts in other decisions, and comparing their amounts with that of the verdict under consideration.<sup>231</sup> We have collected in the same way the cases which we have been able to find, in Texas, where there was a recovery for the mental anguish consequent on inability to attend a relative's funeral. It may be that such a table is worse than useless, that it is a forbidden use of that *res inter alios acta*, so strenuously excluded in other cases, that the sum which would compensate one plaintiff is absolutely no criterion of what is a fair compensation to another plaintiff. On the other hand, it may be that, as a practical matter, such a list is some evidence, at least, of what is a fair and reasonable verdict;<sup>232</sup> at any rate, it is not uninteresting to note the striking evenness of the amounts recovered.

<sup>229</sup> Most profoundly true was that remark of Dunbar, J., in *Gray v. Water Power Co.*, 71 Pac. 206, Wash. 1903, "There is an element of sentiment in all damages—even in the possession and use of money itself—for a given amount of money may be of far more value to one person than to another." In this world, it is to be feared, exact equivalents cannot be found, in the matter of compensation.

<sup>230</sup> *Goodhart v. R. R.*, 177 Pa. 1, 1896, at 14, 15.

<sup>231</sup> *Chitty v. Ry.*, 65 S. W. 959, 1901.

<sup>232</sup> The first judicial indication of a tendency to adopt such a course appeared in these significant words of *W. U. T. Co. v. Cross*, 74 S. W. 1098, Ky. 1903: "The verdict rendered, *as compared with verdicts usually awarded by juries in such cases*, cannot be considered excessive." (Italics ours.)

Relation to plaintiff of person whose funeral was missed.	Amount recov'd.	Name of Case.	Citation.
Parent.....	\$1475.....	W. U. T. Co. v. Beringer.....	84 Tex. 38, 1892.
Parent.....	675.....	W. U. T. Co. v. Cooper.....	69 S. W. 427, 1902.
Parent.....	400.....	W. U. T. Co. v. Johnson.....	9 Civ. App. 48, 1894.
Brother or Sister.....	1000.....	W. U. T. Co. v. Rosentreter.....	80 Tex. 406, 1891.
Brother or Sister.....	750.....	W. U. T. Co. v. Carter.....	24 Civ. App. 80, 1900.
Brother or Sister.....	750.....	W. U. T. Co. v. Thompson.....	18 Civ. App. 279, 1898.
Brother or Sister.....	500.....	W. U. T. Co. v. Ward.....	19 S. W. 898, 1892.
Brother or Sister.....	500.....	W. U. T. Co. v. Hill.....	26 S. W. 252, 1894.
Brother or Sister.....	400.....	W. U. T. Co. v. Johnson.....	16 Civ. App. 546, 1897.
Child.....	750.....	W. U. T. Co. v. Kinsley.....	8 Civ. App. 527, 1894.
Child.....	750.....	W. U. T. Co. v. Rice.....	61 S. W. 327, 1901.
Child.....	450.....	W. U. T. Co. v. Guest.....	33 S. W. 281, 1895.
Child.....	400.....	W. U. T. Co. v. Waller.....	47 S. W. 396, 1898.
Child.....	350.....	W. U. T. Co. v. Davis.....	71 S. W. 313, 1902.

Again, we admit, as needs we must, that although we find that the average recovery in these fourteen cases was \$650, there can be no way of establishing that that sum rather than \$6,500 or \$65,000 represents the money value of the anguish suffered in those cases. We can recognize that \$65 would be too small a verdict, but how can we say what would be too large a verdict: "Appellee testified that he was very much disappointed and grieved at not being able to be present at the funeral of his sister; that he would not have missed it for anything in the world."<sup>233</sup> If we admit that a comparison of verdicts is permissible, however, our difficulty is almost solved. As time goes on and verdicts multiply there will be as much uniformity in the verdicts in these mental anguish cases as though their amounts were fixed by statutes; and certainly the injustice of thus compensating in an equal amount those who may have suffered most unequal wrong is as little in the former as in the latter case.

But granting that all this is entirely irrelevant, and that we must determine without any guide the propriety of a verdict, still it must be admitted that an equal difficulty exists in any case where compensation is given for mental anguish. What common denominator can be found for a father's feeling of shame at his daughter's dishonor and gold or silver, which will not be equally a common denominator for a father's feeling of grief at not seeing the dead body of his daughter and gold or silver? The common law may have furnished no "formula for trans-

<sup>233</sup> *W. U. T. Co. v. Rosentreter*, 80 Tex. 406, 1891.

muting a psychical condition into gold,"<sup>234</sup> but Missouri, which rejects the Texas rule because of the impossibility of ascertaining damages,<sup>235</sup> finds no difficulty in allowing a recovery for the mental anguish which, for years after the trial is ended, a plaintiff is said to be likely to suffer as the result of a physical injury.<sup>236</sup> The same is true in the Federal courts,<sup>237</sup> in Wisconsin<sup>238</sup> and in many other jurisdictions. Pennsylvania, which rejects the Texas rule because of the impossibility of ascertaining the damages, finds no difficulty in allowing the representatives of one now dead to recover compensation for the mental anguish which the sufferer, now far beyond the jurisdiction of any temporal court, had endured up to the time of his death.<sup>239</sup> Upon what basis are these damages assessed?<sup>240</sup>

Let us leave aside even this consideration. The question arises, shall we, because it is impossible accurately, or perhaps even adequately, to compensate a plaintiff for what he has suffered, refuse him all compensation? Under the Anglo-Saxon law, a price was set upon a man according to his rank in life, and if he were killed—homicide being then largely a civil affair—the amount of this *wer* was paid to his relatives.<sup>241</sup> This seems to us a heartless mode of proceeding, but was it less kind than that later development of the law which led Lord Ellenborough to make the famous statement, "The death of a human being cannot be complained of as an injury"<sup>242</sup>? We are not accustomed to think any longer that because "there is no mode of estimating 'compensation' for the death of a man,"<sup>243</sup> recovery in such cases should be denied.<sup>244</sup> Will it not seem to a generation to come equally illogical to admit that, al-

<sup>234</sup> Per Baker, J., in *W. U. T. Co. v. Ferguson*, 157 Ind. 64, 69, 1901.

<sup>235</sup> *Connell v. W. U. T. Co.*, 108 Mo. 459, 1892.

<sup>236</sup> *Smiley v. R. R.*, 160 Mo. 629, 1901.

<sup>237</sup> *Denver Ry. v. Roller*, 100 Fed. 738, 1900.

<sup>238</sup> *Yerkes v. R. R.*, 112 Wis. 184, 1901.

<sup>239</sup> *Maher v. Traction Co.*, 181 Pa. 391, 1897.

<sup>240</sup> See 7 Va. Law Reg. 717, 1902.

<sup>241</sup> Stevens, Hist. Criminal Law, Vol. 1, page 57.

<sup>242</sup> In *Baker v. Bolton*, 1 Camp. 493, 1808.

<sup>243</sup> Per Knowlton, J., in *Ramsdell v. New York, etc., R. R.*, 151 Mass. 245, 249, 1890.

<sup>244</sup> Pollock, Torts (3d ed. English), 58.

though mental anguish is undoubted injury, yet "mental pain or anxiety the law cannot value, and does not pretend to redress"<sup>245</sup>? We are accustomed to think that if a man agrees to do something and cannot do everything that he agreed to do, yet, at the suit of the other party, he will be compelled to do as much as he can, or to pay damages for not fulfilling his contract; and it is difficult to see why a similar principle should not be applied to these cases. A verdict is not like the answer to a geometrical problem, whose correct solution can be determined. It is the collective opinion of twelve average men as to a matter which is incapable of demonstrably correct solution. When that which was a question of opinion becomes a question of fact, we say, paradoxically enough, that it becomes a question of law; by which we mean a question of fact decided by the court. To send a question to a jury presupposes, therefore, that two views are possible, and it is merely a difference in degree whether the doubtful question of fact be the opinion as to negligence or the opinion as to a proper compensation for mental anguish. In neither case is the verdict ascertainably right. We have not reached yet the indefinitely broad conception of the civil law, that "in cases of the unlawful deprivation of some legitimate gratification, although the same are not appreciated in money, yet damages are due";<sup>246</sup> still, few common law judges would take the stand consciously, we suppose, that where exact compensation is impossible, no attempt to compensate shall be made.

Deeply convinced are we that the considerations of public policy urged against the adoption of the Texas rule are based, not on a condition which is, but on a condition which is imagined, and which, like most fancied evils, is more fearful than the actual evils are. If this be true, and if it be true that, in general, mental anguish is, at common law, an element of damage, where a cause of action in tort is established, we submit that the Northern rule con-

<sup>245</sup> Per Lord Wensleydale, in *Lynch v. Knight*, 9 H. L. C. 577, at 598, 1861.

<sup>246</sup> R. C. C. Louisiana, 1934. See *Tissot v. Tel. Co.*, 39 La. Ann. 996, at 1005, 1887; *Lewis v. Holmes*, 34 S. 66, La. 1903 (recovery allowed bride for disappointment due to poor fit of wedding gown).

stitutes an indefensible exception to the common law doctrine. Not only is it negatively not good, but it is positively bad, in that it enlarges the field of *damnum absque injuria*, and by destroying the liability, destroys the responsibility, and consequently the efficiency of a great public utility.<sup>247</sup>

It has been pointed out that the English language, unlike the French or the German, has different words to express "right" and "law." Let us hope that the diversity is verbal only, and that in fact *right* is equivalent to *law*.

The object of this paper has been to suggest that the best basis upon which to lay the foundation for a telegraph company's liability consists in the public nature of its employment; and that, so laid, recovery can be had, according to the ordinary measure of damages in delictual actions, in every case in which a message is sent and carelessly handled, whether the message be open or cipher, and whether the natural and not too remote consequences of its non-delivery or of its late or inaccurate delivery be pecuniary or sentimental injury. We do not flatter ourselves that these suggestions have not been made already, with much greater force than our humble ability has permitted us to present them, but we shall feel that our effort has not been in vain if we have succeeded in no more than calling attention to these thoughts of others.

*Morris Wolf.*

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<sup>247</sup> *Cashion v. W. U. T. Co.*, 123 N. C. 267, at 272, 1898.